TRANSCRIPT OF RECORD

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1898.

No. 207.

E. F. BLACK, APPELLANT,

vs.

WALTER P. JACKSON.

APPEAL FROM THE SUPREME COURT OF THE TERRITORY OF OKLAHOMA.

FILED JULY 29, 1898.

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SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1898.

No. 351.

E. F. BLACK, APPELLANT,

vs.

WALTER P. JACKSON.

APPEAL FROM THE SUPREME COURT OF THE TERRITORY OF OKLAHOMA.

INDEX.

	Origina	Print.
Caption	1	1
Petition in error	2	1
Waiver of citation	3	2
Exhibit A—Case-made from district court of Kay county	2	2
Petition	4	2
Decisions of Secretary of Interior	6	3
Answer	8	5
Order granting leave to withdraw answer and file demurrer	11	7
Demurrer to petition	11	7
Order overruling demurrer to petition	12	8
Amended answer	12	8
Order sustaining demurrer to answer	18	11
Judgment	19	12
Bond on appeal	21	13
Clerk's certificate	22	14
Attorneys' certificate	23	14
Judge's certificate	23	15

	Original.	Pri
Judgment	25	1
Opinion	26	1
Petition for rehearing	32	1
Order overruling petition for rehearing	37	2
Petition for appeal	38	2
Affidavit of value by S. H. Harris	39	2
T. J. Harris	40	2
W. P. Franklin	41	2
J. Thomas	42	2
J. R. Potts	43	2
Allowance of appeal	44	2
Assignment of errors	44	2
Order fixing amount of bond, &c.	47	2
Bond on appeal	49	2
Citation (copy)	51	2
Clerk's certificate	52	2
Citation and service (original)	53	3

Print
15
16
19
22
22
23
23
24
24
25
25
26
27
27
29
29
30

1 In the Supreme Court of the Territory of Oklahoma.

E. F. BLACK, Plaintiff in Error,
vs.
WALTER P. JACKSON, Defendant in Error. } No. 572.

UNITED STATES OF AMERICA, *Territory of Oklahoma,* } *ss:*

Be it remembered that in the supreme court of the Territory of Oklahoma, at the city of Guthrie, in said Territory, at the times hereinafter mentioned, the following papers were filed and proceedings had in the above-entitled cause, to wit, petition in error and case-made, thereto attached as "Exhibit A."

2 Filed April 10th, 1897.

In the Supreme Court of the Territory of Oklahoma.

E. F. BLACK, Plaintiff in Error,
vs.
WALTER P. JACKSON, Defendant in Error.

Petition in Error.

The said plaintiff in error complains of said defendant in error for that the said Walter P. Jackson, at the February term, 1897, of the district court of Kay county, Oklahoma Territory, recovered a judgment, by the consideration of said court, against the said E. F. Black, in a certain action then pending in the said court, wherein the said Walter P. Jackson was plaintiff and E. F. Black was defendant. A certified transcript of the record of said court and the original "case-made," duly certified and attested, is hereto attached, marked "Exhibit A," and made a part of this petition in error; and the said E. F. Black avers that there is error in the said record and proceedings in this, to wit:

First. That said court erred in overruling the demurrer of the defendant in said action, plaintiff herein, to the "application for mandatory injunction" of plaintiff in said action, defendant herein.

Second. That said court erred in sustaining the demurrer of plaintiff in said action, defendant herein, to the answer of defendant in said action, plaintiff herein.

That said court erred in assuming and exercising jurisdiction over the subject-matter of said action.

Plaintiff asks proper relief.

G. J. MECHLING AND
S. H. HARRIS,
Att'y. for Pl'ff in Error.

3 TERRITORY OF OKLAHOMA, }
Noble County. }

We, the attorneys of record for the defendant in error in th above-entitled action, hereby waive the issuance and service o summons in the above-entitled cause and hereby enter a genera appearance in said cause for the defendant in error therein.

Dated this 10th day of March, 1897.

E. BEE GUTHREY,
Attorney for Defendant in Error.

EXHIBIT A.

In the District Court of Kay County, Oklahoma Territory.

WALTER P. JACKSON, Plaintiff, }
vs. } No. 678.
E. F. BLACK, Defendant. }

Case-made.

Be it remembered that heretofore, to wit, on the 4th day of De cember, 1896, the plaintiff, Walter P. Jackson, commenced his actio against said defendant by filing in the district court of Kay count his petition, which is in words and figures following, to wit:

In the District Court of the 4th Judicial District in and for Ka County, Oklahoma Territory.

WALTER P. JACKSON, Plaintiff, }
vs.
E. F. BLACK, Defendant. }

4 *Application for Mandatory Injunction.*

Comes now Walter P. Jackson, the plaintiff in the above-entitle cause, and for cause of action against the defendant charges an alleges as follows, to wit:

First.

That this plaintiff has a homestead entry upon the S.W. ¼ sec. 2 T. 28, R. 2 east, I. M., and that said homestead entry was made o November 17th, 1896, as evidenced by the copy of the receiver duplicate receipt, hereunto attached, marked "Exhibit "A," and mad a part of this petition.

Second.

Prior to the 27th day of November, 1896, this land has been em braced in the homestead entry of the defendant, E. F. Black, an said entry was finally held for cancellation by the Hon. Secretar of the Interior in his decision of October 26th, 1896, wherein th

defendant's, Black's, motion for review was denied, and the plaintiff herein, Walter P. Jackson, was allowed to make entry of the land.

Affiant further states that notwithstanding the final decision of the Hon. Secretary of the Interior cancelling the homestead entry of the defendant herein and awarding the land to this plaintiff, and notwithstanding the fact that said contest has been finally adjudicated in the Land Department, and notwithstanding the fact that this plaintiff has now at this time the homestead entry on this tract of land, and that all rights which the defendant has heretofore held therein has been dismissed, that the said defendant continues to remain in possession of the west 80 acres of said tract of land, and refuses and neglects to vacate the same, although requested by this plaintiff so to do; that said defendant now at this time wrongfully holds possession thereof and refuses and neglects to give possession of the same.

Affiant further states that the said defendant has upon said tract of land a barb-wire fence, a well curb, and other improvements attached to the realty.

Affiant further states that said defendant is financially unable to respond in damages for the injury that he is now causing this plaintiff by his trespassing upon the land, and that this affiant has no adequate remedy at law other than by this suit now filed.

Wherefore affiant prays that the court grant him a mandatory injunction, enjoining said defendant from entering upon or in any manner whatsoever trespassing upon or using any portion of the land embraced in the homestead entry of this plaintiff, and that said defendant be further enjoined from removing or in any manner destroying the fence, wells, or other improvements on said lands which are permanently attached thereto.

Affiant further asks for judgment against said defendant for the costs of this action, statutory attorney's fees, and such other and further relief as the court may deem just and right.

WALTER P. JACKSON.

Subscribed and sworn to before me this 4th day of December, 1896.

F. M. BEALE,
Dep. Clerk of District Court.

DEPARTMENT OF THE INTERIOR,
WASHINGTON, D. C., *June* 18, 1896.

Vol. 23, No. 181.

WALTER P. JACKSON and THEODORE VAN ANTWERP
vs.
EPHRIAM F. BLACK.

The Commissioner of the General Land Office.

SIR: Ephraim F. Black and Theodore Van Antwerp have appealed from the decision of your office dated June 29, 1895, in the case of said Jackson and Van Antwerp *v.* Ephriam F. Black, hold-

ing homestead entry No. 3071 upon the S. W. ¼ of sec. 26, T. 28 N., R. 2 E., Perry land district, Oklahoma, subject to the prior right of Jackson, and dismissing Van Antwerp's contest.

Said decision fairly sets forth the facts in this case, and the conclusion therein reached is sustained by the testimony and is in conformity with law and the decisions of the department and is hereby affirmed.

The papers in the case are herewith returned.

Very respectfully, JNO. M. REYNOLDS,
Acting Secretary.

Copy.

I, Louis Davis, register of the U. S. land office at Perry, O. T. certify that the above is a true and correct copy of the decision of the Hon. Secretary of the Interior in the case of Walter P. Jackson and Theodore Van Antwerp *vs.* Ephriam F. Black, and that service of said decision was duly made upon L. P. Hudson, attorney of record for said Black, on the 3 day of August, 1896.

LOUIS DAVIS, *Register.*

O K.
M. C. L.

Copy.

DEPARTMENT OF THE INTERIOR,
WASHINGTON, *October* 26, 1896.

7 WALTER P. JACKSON and THEODORE Van Antwerp *vs.* EPHRIAM F. BLACK. } Motion for Review Perry, O. T.

The Commissioner of the General Land Office.

SIR: The defendant in this case has filed a motion for review of departmental decision rendered therein on June 18, 1896 (L. & R. No. 336, p. 179), but no new question of law or fact is presented and it is therefore denied.

The papers are herewith returned.

Very respectfully, DAVID R. FRANCIS, *Secretary.*

I, Louis Davis, register of the U. S. land office at Perry, O. T. hereby certify that the above is a true and correct copy of the Hon. Secretary's decision on the motion for review in the case of Walter P. Jackson and Theodore Van Antwerp *vs.* Ephriam F. Black, and that service thereof was duly made upon L. P. Hudson, attorney of record for the said Black, on the 13th day of November, 1896; and I further certify that the records of this office show that on the 17th day of November, 1896, the said Walter P. Jackson made homestead entry of the tract of land involved in this controversy, and that said entry is now on record, and that since said 17th day of Novem

ber, 1896, no further papers has been filed in this office with relation to said tract of land.

O K.

M. C. L.

LOUIS DAVIS, *Register.*

On which petition is indorsed the following: In the district court of the 4th judicial district in and for Kay county, Okla.
8 Territory. Walter P. Jackson *vs.* E. F. Black. No. 678. Petition. Filed December the 4th, 1896. J. H. Havighorst, clerk. F. M. Beale, dep'y. Howe and Guthrey, att'ys for Jackson.

And afterwards, to wit, on the 2nd day of January, 1897, said defendant filed in said court his answer to said petition; which answer is in the words and figures following:

TERRITORY OF OKLAHOMA, } *ss:*
County of Kay, }

In the District Court.

WALTER P. JACKSON, Plaintiff, }
vs. } Answer.
EPHRIAM F. BLACK, Defendant, }

1st defence. Comes now the defendant and for answer to plaintiff's petition says:

That he is and has been residing on this land with his family and has valuable improvements thereon, and that he should not be deprived of the use thereof and the possession of the same without the right to a trial thereof by jury, and that if the matters stated in plaintiff's petition do give him any cause of action against this defendant that said plaintiff has a plain and adequate remedy at law for the possession of said land, and that defendant should not be deprived of that which he has in his possession by injunction.

2nd defence. Defendant, for a further answer, alleges:

That on the 16th day of September, 1893, after 12 o'clock noon, central standard time, when the signal of opening was given, this defendant ran from the 100-foot strip along the south line of the State of Kansas that had been measured and staked off by those in charge under the President's proclamation and entered upon and made settlement on and filed his homestead entry for said land at the U. S. land office at Perry, Oklahoma, on the 31st of October, 1893; that plaintiff herein filed a contest against said entry.
9 That at the trial it was proven and admitted by the said Jackson that he, when the signal was given on the day of the opening, September 16, 1893, ran from a point on the south side of the Chilocco reservation to the land in question.

That said south side of said Chilocco reservation is three and one-half miles south of the southern boundary line of the State of Kansas and within the boundary lines of the country known as the Cherokee outlet.

That Congress provided for the opening of this country to settlement by an act of Congress approved March 3, 1893, which is hereby referred to and made a part of this answer.

That the President of the United States, in conformity to the act of Congress, by proclamation, dated August 19, 1893, which is made a part of this answer, ordered the country known as the Cherokee outlet opened to settlement at 12 o'clock noon, central standard time, of September 16, 1893.

That said proclamation defined the boundary lines of the country to be opened to settlement, prescribed the rules governing said opening and the land upon which intending settlers would be permitted to go prior to the hour of opening.

Said proclamation did not give permission to any one to run from the south side of said Chilocco reservation, and plaintiff herein violated said proclamation and disqualified himself to enter and hold lands in the Cherokee outlet by going to said south side of said land known as the Chilocco reservation prior to 12 o'clock noon of September 16, 1893, and making the race from said point to said land.

That said violation of the President's proclamation disqualified plaintiff to enter or hold said land, and that the same was called to the attention of the land officers, but that they misinterpreted and misconstrued said proclamation of August 19, 1893, and found that plaintiff was not disqualified by reason of having gone to the south side of said Chilocco reservation, and was not thereby a sooner as defined in said proclamation.

That defendant duly appealed to the Commissioner of the General Land Office, and from that officer to the Secretary of the Interior; that each of said officers misconstrued said proclamation and misinterpreted the same, to the detriment and injury of this defendant.

That defendant duly filed a motion for review, which motion was denied, and that this defendant has now exhausted all of his remedies in the Land Department of the United States.

Defendants further alleges that by reason of said officers mistaking the law and misconstruing the President's proclamation of August 19, 1893, opening said country to settlement, his said entry was ordered cancelled, and plaintiff, although disqualified as above set forth, allowed to make entry.

Defendant therefore asks that the court construe the sooner clause of said proclamation of August 19, 1893; that plaintiff be disqualified to enter and hold lands under said proclamation, and that defendant be permitted to remain in the possession thereof, and for such other and further relief as to the court may seem just and proper.

G. J. MECHLING,
Att'y for Defend.

TERRITORY OF OKLAHOMA, } ss:
County of Kay, }

E. F. Black, being duly sworn, on his oath says that he is the defendant in the above action; that he has heard read the foregoing answer, knows the contents thereof, and that the facts stated therein are true.

E. F. BLACK.

Subscribed and sworn to before me this 2nd day of January, 1897.

——— ———.

11 Which answer is indorsed as follows: No. 678. In district court. W. P. Jackson *vs.* E. F. Black. Answer. Filed Jan'y 2, 1897. J. H. Havighorst, clerk, by F. M. Beale, dep. G. J. Mechling, att'y for defendant.

And afterward, to wit, on the 15th day of Feb., 1897, the parties of said action appeared in court by their respective attorneys, and the defendant asked leave of court to withdraw his answer to the petition of plaintiff and file a demurrer to said petition.

Whereupon the court made the following order:

"Now, upon this 15th day of February, 1897, defendant asks leave of the court to withdraw his answer heretofore filed herein and to file a demurrer to the petition of the plaintiff, which is granted by the court, and defendant is given until the 23 day of February, 1897, to further plead herein, on condition that in case the demurrer of defendant to plaintiff's petition be overruled, defendant will immediately file his amended answer to the petition."

And afterwards, to wit, on the 23 day of January, 1897, said defendant filed his demurrer to the petition of plaintiff in the words and figures following:

In the District Court of Kay County, Territory of Oklahoma.

WALTER P. JACKSON, Plaintiff, }
vs. } Demurrer.
E. F. BLACK, Defendant. }

Defendant demurs to the so-called "application for mandatory injunction" in this case for the following reasons:

1st. That said document is not a petition and does not contain the necessary title and commencement as prescribed by
12 statutes of this Territory.

2nd. That said document termed an "application for mandatory injunction" does not state facts sufficient to constitute a cause of action.

3rd. That the court has no jurisdiction of the subject of the action

sought to be presented in said "application for mandatory injunction."

G. J. MECHLING AND
S. H. HARRIS,
Attorneys for Defendant.

And afterwards and upon the said 23 day of February, 1897, said cause *coming* on for hearing upon the demurrer of defendant to the petition of plaintiff, and upon consideration thereof the same was by the court overruled; to which ruling of the court the defendant duly excepted and still excepts; and thereupon defendant asked permission to answer the petition and application of plaintiff for a mandatory injunction; which permission was granted by the court.

Whereupon, on the said 23 day of February, 1897, defendant filed his amended answer to the petition of plaintiff, which is in the words and figures following, to wit:

In the District Court of Kay County, Oklahoma Territory.

WALTER P. JACKSON, Plaintiff,
vs.
E. F. BLACK, Defendant. } Answer.

For amended answer to the petition or "application for mandatory injunction" herein, defendant states:

1st. That he has been residing upon the land described in plaintiff's petition since about the 16th day of September, 1893, claiming a right thereto under and by virtue of the laws of the United
13 States, and was at the time of settlement of said land and has ever been since a legally qualified homestead claimant for said land, and had done no act of any kind or nature since the said 16 day of September, 1893, that has disqualified him to hold said land as a homestead.

That on the 31 day of October, 1895, he filed a homestead entry upon said land, and afterwards the plaintiff herein filed a contest against the entry of the defendant upon the ground that plaintiff's settlement upon said land as a homestead claimant was prior to that of defendant and prior to the filing of the homestead entry by defendant.

That it has been finally determined and decided by the Land Department of the United States that defendant's settlement upon and entry of said land was subsequent to that of plaintiff, and defendant's homestead entry cancelled and plaintiff allowed to make homestead entry upon said land upon the sole ground that plaintiff's settlement upon said land was prior to the settlement and homestead entry of the defendant.

That defendant during the time that he has resided upon said land has continued to place thereon lasting and valuable improvements, which are in the aggregate worth about the sum of $500.00, and defendant claims to be entitled to the benefit of the laws of the

United States and of the Territory of Oklahoma relating to occupying claimants, and that his rights cannot be disposed of a case in equity before the court only.

2nd. For further answer and defense to plaintiff's action this defendant says that he was on the 16th day of September, 1893, and ever since has been a native-born citizen of the United States and in all respects qualified to make homestead entry upon the land in question, and on the said 16th day of September, 1893, after 12 o'clock, central standard time, defendant, when a signal indicating that the moment for starting from the outer line of the Cherokee out-
14 let was given, ran from the 100-foot strip along the south line of the State of Kansas that had been measured, staked off, and reserved as a gathering place for those who desired to run for lands in the Cherokee outlet, and made all possible haste to secure and settle upon a suitable piece of land as a homestead.

That there were many thousands of people along said line, more than could secure homes in said outlet, allowing one hundred and sixty acres to each qualified entryman.

That the plaintiff herein, not observing the law, proclamation of the President, and rules governing the opening of said lands to settlement, and for the purpose of gaining an unlawful and undue advantage of defendant and others seeking a home in said outlet, crossed said 100-foot reserve around the outer boundary of said lands prior to 12 o'clock noon, central standard time, September 16th, 1893, and unlawfully and wrongfully entered upon the lands embraced within said outlet and within said 100-foot reservation known as the Chilocco reservation, and at the hour of noon, when said outlet was opened to settlement, plaintiff started on the race for a home from the south line of said Chilocco reservation and about three and one-half miles south of said 100-foot reservation along the northern boundary of said Cherokee outlet, and thereby wrongfully, unlawfully, and unjustly started in the race for a home three and one-half miles in advance of this defendant and others who observed the law of Congress opening said lands to settlement and the President's proclamation pursuant thereto; that plaintiff's prior settlement was wholly by reason of said advantage.

That said plaintiff filed in the United States land office at Perry, O. T., contest against the homestead entry of defendant made
15 upon the land described in plaintiff's petition on the 31st day of October, 1893, and as grounds for said contest alleged and claimed that the plaintiff settled upon the land in question and claimed the same as his homestead prior to settlement and homestead entry of defendant.

That upon the trial of said contest it was conclusively proven and admitted by plaintiff that plaintiff had started upon the race from the south line of the Chilocco reservation, as aforesaid.

That upon the trial and hearing of said contest the register and receiver of the land office at Perry, O. T., from the evidence that said plaintiff had started upon the race from the point and in the manner hereinbefore mentioned, and also that plaintiff's settlement upon and claim of said land was prior to that of defendant, and the

qualification of said plaintiff to acquire a homestead on account of his having entered upon said land in violation of the act of Congress opening the same to settlement and the President's proclamation pursuant thereto, was directly in issue between plaintiff and defendant in said contest case. But the register and receiver of the land office, even though finding from the evidence and admissions of plaintiff that he had so entered upon said land, misunderstood and wrongfully interpreted and misapplied the law in relation to the qualification of plaintiff to take and hold said land as a homestead, and expressly found as a matter of law that plaintiff was not disqualified as a sooner by reason of having entered upon said lands in the manner aforesaid.

That defendant herein duly appealed from the decision of said register and receiver to the Commissioner of the General Land Office and presented to said Commissioner the same question with reference to the disqualification of plaintiff to acquire title to
16 said land as a homestead, and said Commissioner misapplied the law and wrongfully and unlawfully sustained the conclusion of the register and receiver in that regard.

That the defendant then appealed to the Secretary of the Interior, to whom the same legal question was submitted, and said Secretary misapplied the law in relation to the qualification of plaintiff and wrongfully and unlawfully sustained the said findings of the Commissioner of the General Land Office.

That defendant duly filed his motion for review in said case, in which said question as to the qualification of plaintiff was presented, and urged a reconsideration and reversal, and said Secretary, still misunderstanding and misapplying the law, wrongfully and unlawfully refused the defendant a review in said contest, and wrongfully and contrary to law cancelled the homestead entry of defendant and permitted plaintiff to make homestead entry of said land, although plaintiff was at the time and still is wholly disqualified to acquire title to said land based upon a prior settlement by reason of his having entered upon said Cherokee outlet in violation of law.

That plaintiff, by reason of his disqualification as aforesaid, can never acquire the title of the land in question, and can never acquire a greater estate therein than a trust estate for the sole benefit of this defendant.

That defendant is lawfully entitled to reside upon said land as a homestead and acquire the title thereto by compliance with the laws of the United States and the rules of the Land Department.

That plaintiff, being disqualified to acquire title to said land, should not be heard in this action to the demand that defendant be ejected from said land and his home and improvements thereon, all of about the value of $300.

17 Defendant further says that if he is ejected from said land and his home and improvements thereon by order of this court he verily believes and so states the fact to be that said plaintiff will relinquish to the Government of the United States for a valuable consideration all his claim to and interest in said land,

and that the same will be entered as a homestead by some other person qualified to enter and hold the same and a stranger to the disqualification and wrongful acts of the plaintiff herein.

That said land, with the improvements thereon by this defendant, could be transferred in the manner aforesaid for the sum of $6,000.00.

Defendant further says that he has been by temporary order of this court restrained from exercising the right of possession and control over all of said land, with the exception of about five acres occupied by his dwelling and improvements immediately surrounding the same.

That he is ready and willing to execute to plaintiff a good and sufficient bond to compensate him for all loss of every kind or nature occasioned by defendant's occupancy and detention of said five acres and improvements, provided defendant is allowed to retain his possession thereof and so remain in position to assert his rights to all of said land as soon as he can possibly do so in accordance with law.

Wherefore defendant prays:

First. That plaintiff be not allowed to further maintain his action against him for the possession of said land or any part thereof.

Second. That in the event that defendant's first prayer is not granted by the court, then that plaintiff be denied the right to maintain his action to the extent of wholly ejecting defendant from said five acres and his dwelling and improvements
18 situated thereon until such time as plaintiff shall acquire a patent to said land and defendant be in a position to commence a suit for the purpose of having the title of plaintiff so acquired declared by the court to be held in trust for this defendant.

Defendant further prays that in the event his first prayer is granted by the court that plaintiff be taxed with all the costs of this case, and in the event that defendant is allowed to retain said five acres and improvements thereon that the costs of this action be divided equally between the parties.

E. F. BLACK,
By G. J. MECHLING AND
S. H. HARRIS.

TERRITORY OF OKLAHOMA, } ss:
Kay County, }

E. F. Black, being first duly sworn according to law, says that he is the defendant in the above-entitled action; that he has read the foregoing answer and knows the contents thereof, and that all the allegations, statements, and averments therein contained are true as he verily believes.

E. F. BLACK.

Subscribed and sworn to before me this 23rd day of February, 1897.

J. H. HAVIGHORST,
Clerk District Court,
By F. M. BEALE, *Deputy.*

And afterwards and on the 26th day of February, 1897, said cause came on for hearing upon the answer of defendant and the general demurrer of plaintiff considered as filed thereto, and upon consideration thereof said demurrer was sustained upon the ground that defendant's answer does not state facts sufficient to constitute a defense to plaintiff's petition; to which ruling of the court defendant excepted and still excepts, and thereupon the court made the orders and findings set forth in the journal entry then and
19 there reduced to writing, signed by the court, and entered of record upon the journal; which journal entry and orders and judgment of the court is in words and figures following:

In the District Court of Kay County, Territory of Oklahoma.

WALTER P. JACKSON, Plaintiff,
vs.
E. F. BLACK, Defendant.

Journal Entry.

Now, upon this 15th day of February, 1897, defendant asks leave of the court to withdraw his answer heretofore filed herein and to file a demurrer to the petition of plaintiff, which is granted by the court, and defendant is given until the 23rd day of February, 1897, to further plead herein, on condition that in case the demurrer of defendant to plaintiff's petition be overruled defendant will immediately file his amended answer to the petition.

And now, upon this 23rd day of February, 1897, this cause comes on for hearing upon the demurrer of defendant to the petition of plaintiff, and upon consideration thereof the same is overruled; to which ruling of the court the defendant duly excepts.

And thereupon defendant asks permission to answer the petition and application of plaintiff, which is accordingly granted by the court.

And now, upon this 26th day of February, 1897, the same being one of the regular term days of the regular February term, 1897, of the above-entitled court, this cause comes on for further hearing upon the amended answer of the defendant and the demurrer considered filed thereto by the plaintiff, upon the ground that said answer
20 does not state facts sufficient to constitute any defense to the cause of action stated in plaintiff's petition or application for mandatory injunction, plaintiff appearing by E. Bee Guthrey, his attorney, and defendant appearing by S. H. Harris, his attorney, and upon consideration of said matter the court finds that said answer does not state facts to constitute any defense to the cause of action stated in plaintiff's application for mandatory injunction herein, and said demurrer is sustained upon the grounds stated herein; to which finding, ruling, and order of the court defendant duly excepts, and defendant refusing and declining to ask permission to further plead to the application of plaintiff for mandatory injunction and electing to stand upon said answer, judgment is

rendered for the plaintiff as prayed for in said application for mandatory injunction upon the evidence offered and considered, and plaintiff is not required to give bond to put this judgment into effect. It is further ordered and adjudged by the court that defendant be, and he is hereby, enjoined from in any manner entering upon the premises described in plaintiff's application for injunction or exercising any further control or possession over the same, except for the purpose of removing his improvements from the same, and defendant is given 30 days within which to move all his removable improvements, including buildings and fences, from said premises.

At defendant's request he is given thirty days within which to prepare and serve a case-made for the supreme court, plaintiff given ten days to suggest amendments thereto, case to be settled upon five days' notice by either party.

It is further ordered that defendant have ten days' time within which to make and file his bond for the stay of execution herein in the sum of three hundred dollars, and in case said bond be
21 given and approved by the clerk of this court and said appeal filed in the supreme court of the Territory within sixty days, then defendant is to retain possession of the five acres of said premises described in the temporary order of injunction herein pending said appeal.

Said bond to be conditioned for the payment of all costs which the defendant may be adjudged to pay and for all damages occasioned by his use and occupancy of said five acres during the pendency of said appeal.

A. G. C. BIERER, *Judge.*

And afterwards and on the 6th day of March, 1897, said defendant filed his bond for the stay of execution upon said judgment; which bond was duly approved by the clerk of said court on the 6th day of March, 1897, and which said bond is in the words and figures following, to wit:

In the District Court of Kay County, Territory of Oklahoma.

WALTER P. JACKSON, Plaintiff,
vs.
E. F. BLACK, Defendant.

Undertaking on Appeal.

E. F. Black, as principal, and T. K. Bell, as sureties, hereby acknowledge themselves bound to the plaintiff herein, Walter P. Jackson, in the sum of three hundred dollars, upon the following conditions:

Whereas the said plaintiff on the 26th day of February, 1897, recovered a judgment against the defendant, E. F. Black, for an injunction removing said defendant from the premises described in plaintiff's petition in said action, and the court, at the time of rendering said judgment, further ordered and adjudged that said

defendant be allowed sixty days within which to file an ap-
22 peal in the supreme court of the Territory of Oklahoma for the reversal of said judgment, and in case said appeal was so filed, then defendant to be allowed to retain the possession of five acres of said premises, as described in the temporary order of injunction in said cause, including the house and surrounding improvements of defendant during the pendency of said appeal:

Now, therefore, if said defendant shall duly prosecute his appeal in said action within the time limited by said order, and duly pay all costs that may be adjudged against him in said cause, and duly comply with all orders or judgments of the court rendered therein, and pay to said plaintiff all damages occasioned by the detention and occupancy of said five acres and improvements during the pendency of said action, in case the judgment of the district court shall be finally affirmed, and abide the judgment of the court, then this obligation to be void; otherwise to remain in full force and effect.

Witness our hands this 4th day of March, 1897.

(Signed) E. F. BLACK.
T. K. BELL.
W. G. JONES.
D. F. SPARKS.

Endorsed: Filed and approved this 6th day of March, 1897. J. H. Havighorst, clerk. F. M. Beale, dep.

TERRITORY OF OKLAHOMA, } ss:
Kay County, }

I hereby certify that the foregoing copy of petition, copy of answer, copy of demurrers, copy of amended answer, copy of journal entry, copy of undertaking on appeal, are each and all true, correct, and exact copies of the originals now on file and of record in my office.

Dated this 17th day of March, 1897.

[SEAL.] J. H. HAVIGHORST, *Clerk*,
By F. M. BEALE, *Dep.*

Fees on transcript, $6.95.

23 The foregoing contains a true and correct statement and copy of all the pleadings, motions, orders, findings, and proceedings upon which judgment was rendered.

G. J. MECHLING AND
S. H. HARRIS,
Attorneys for Plaintiff in Error.

TERRITORY OF OKLAHOMA, } ss:
Noble County, }

I, the undersigned, attorney for the plaintiff in the foregoing suit, hereby certify that the foregoing case-made and certified copy of record of proceedings in said cause was duly served on me this 10th day of March, 1897, and that the same contains a true and correct

copy of all the pleadings, motions, orders, findings, and proceedings upon which judgment was rendered, as well as a true copy of all orders of the court in reference thereto, as well as the undertaking of defendant on appeal; and I hereby waive all time for submitting amendments to said case and certified record, and agree that the same may be signed and settled without further notice.

E. BEE GUTHREY,
Attorney for Plaintiff.

TERRITORY OF OKLAHOMA, *Kay County,* } ss:

This is to certify that the foregoing above case-made and the amendments thereto have been duly served in due time and the same duly submitted to me for settlement and signing, as required by law, by the parties to said cause.

That the same as above set forth and corrected by me is true and correct statement of all the pleadings, motions, orders, findings, proceedings, and judgment had in said case, and I hereby
24 settle, allow, and certify the same as true and correct, and hereby order that the clerk of the district court attest the same with the name and seal of said court and file the same of record as provided by law.

Witness my hand, at Pawnee, Pawnee county, in said Territory, this the 27th day of March, 1897.

A. G. C. BIERER,
Judge of District Court.

Attest:
[SEAL.] JOHN H. HAVIGHORST, *Clerk.*

Filed March 27, 1897.

J. H. HAVIGHORST.

Said petition in error and case-made thereto attached is indorsed on back as follows: No. 572. E. F. Black, plaintiff in error, *vs.* W. P. Jackson, defendant in error. "Case-made." Filed April 10th, 1897. Edgar W. Jones, clerk. S.

25

FEBRUARY 18TH, 1898.

E. F. BLACK, Plaintiff in Error,
vs.
WALTER P. JACKSON, Defendant in Error. } No. 572.

The above cause coming on for disposition, the court being fully advised in the premises, it is considered, ordered, and adjudged that the same be in all things affirmed; to which the plaintiff in error excepts; exception allowed.

26 In the Supreme Court of the Territory of Oklahoma.

E. F. BLACK, Plaintiff in Error,
vs.
WALTER P. JACKSON, Defendant in Error. } No. 572.

Syllabus.

1. Injunction — Homesteads — When granted. — Where adverse claimants are residing upon a tract of land and each claiming the same as a homestead, by virtue of priority of settlement, and the Land Department makes a final award thereof, the losing party cannot properly claim the right to continue his residence upon the land for the purpose of bringing a suit in equity to declare a trust against his successful adversary when he has already resided upon the land a sufficient length of time under the law to enable him to make final proof for the land.

Error from Kay county. Affirmed.

S. H. Harris and G. J. Mechling, attorneys for appellant; Howe & Guthrie, attorneys for appellee.

The opinion of the court was delivered by DALE, C. J.:

This case comes here from Kay county to reverse the ruling of the lower court upon a demurrer. It appears from the record before us that Walter P. Jackson filed a petition in the district court for an injunction, prohibitive and mandatory, against E. F. Black, praying that Black be prohibited from further trespassing on or interfering with his possession of the S. W. ¼ of sec. 26, T. 28, R. 2 east, land situated in Kay county, and further asking that Black be required to remove from said land. Jackson alleged that he had a homestead filing upon the tract of land above described.

To this petition Black answered by stating in substance
27 that he had resided upon the tract of land since about September 16th, 1893, at which date he settled upon and claimed the land as his homestead; that he filed a homestead entry thereon on October 31st, 1893; that in a contest in the local land office and Interior Department it had been finally determined that Jackson settled upon the tract in dispute prior in point of time to his, Black's settlement, and for that reason alone his homestead filing was cancelled and Jackson awarded the right to file upon the land; that during his residence upon the tract in dispute he, Black, had made improvements thereon to the value of $500.00; that he is in all respects qualified under the laws of Congress to acquire a homestead; that Jackson is not qualified to obtain title to the land as a homestead for the reason that he entered upon the land in violation of sec. 10 of the act of Congress approved March 3rd, 1893; that at the hearing of the case in the local land office it was conclusively shown and admitted by Jackson that he, Jackson, on September 16th, 1893, the day upon which the Cherokee outlet was opened to settlement, started upon the race for land from the south line of the

Chilocco reservation, such place of starting being three and one-half miles south of the north boundary line of the Chereokee outlet; and it is claimed by Black that the facts so proved and admitted forever disqualified Jackson from acquiring any right to the land by reason of the prohibition contained in sec. 10, *supra*. It is further alleged that the only questions involved in the land contest were those of prior settlement and the qualification of Jackson to make a homestead entry, and, notwithstanding Jackson's proved and admitted disqualification, the local land office, the Commissioner of the General Land Office, and the Secretary of the Interior decided in favor of
28 Jackson upon both the question of priority of settlement and the qualifications of Jackson to file a homestead entry for the land; that upon the latter proposition the Land Department misapplied the law, and by reason of such mistake alone awarded the land to Jackson and cancelled Black's entry; that he, Black, is entitled to the land under the law and is desirous of bringing action in the proper court to have Jackson declared his trustee, but until Jackson shall have made his final proof for the land and the Government has parted with its title the courts have no jurisdiction of that character of a case; that if he is removed from the land Jackson will sell his homestead right to another, thereby depriving Black of his right to bring the action in the courts; that he is only desirous of retaining possession of about five acres of the land, occupied by his dwelling and improvements made surrounding the same, until such time as Jackson shall make final proof, and avers his willingness to give sufficient bond to indemnify Jackson against any loss which may occur by reason of his occupancy of such tract of land. He further claims that the land is worth $6,000.00, and that if he is removed Jackson will sell and relinquish his claim and the same will be entered by some person who is qualified under the law to take a homestead.

A demurrer was interposed to the answer and sustained, and by its judgment Black was enjoined from further entering upon the land except for the purpose of removing his improvements. The only question for our determination in this case is whether or not the answer of Black sets up such a defense as will justify the court in refusing injunction as prayed.

This court has held in Woodruff *vs.* Wallace, 3 Okla., 355, that—

29 "District courts of this Territory have jurisdiction to inquire into the right of possession as between settlers upon public lands, and where it appears that the rights of adverse claimants have been adjudicated by the Land Department, and the homestead entry of one of the parties cancelled, the district court may, by injunction, give exclusive possession to the person who was successful in the contest proceedings."

In that case, however, all of the matters in dispute between the parties were questions of fact, and the facts as found by the Land Department are binding upon the courts.

Johnson *vs.* Towsley, 13 Wall. U. S., 72.

Leo *vs.* Johnson, 116 U. S., 48.

In this case, upon the question of prior settlement, the finding by the Land Department in favor of Jackson is conclusive upon the courts, but it does not follow that the courts will also be governed upon questions of law as announced by the Land Department. On the contrary, the courts do have jurisdiction to correct mistakes of law, if any occur, and to award land to the party who may, under the laws of Congress, be entitled thereto.

Johnson *vs.* Towsley, *supra.*

But this jurisdiction never obtains in the courts until after the title to the land has passed from the United States and the question becomes one of private rights. It therefore follows that the courts cannot now interfere to compel the Land Department to reinstate Black's homestead filing or in any manner to interfere with the intention of the Land Department to permit Jackson to make final entry for the disputed tract and to receive a patent therefor.

In the case under consideration it is alleged in the answer of Black that Jackson can never acquire a legal title to the tract of land in dispute by reason of having entered the Cherokee outlet in violation of the act of Congress and the President's proclamation in opening the land to settlement, and that if he, Black, is removed from the land Jackson will sell or relinquish his rights to the claim to some person who is qualified to enter the land, and thereby prevent Black from ever asserting his claim in the courts; that if he is permitted to retain a small portion of the land any person purchasing will take the land with notice of his claim, etc.

From an examination of the practice of the land tribunal we find no provision for a *lis pendens* notice and no rule whereby notice of an adverse claim might be effectual to guard against the threatened danger, and if we were of the opinion that the only way by which Black could protect his rights would be by remaining upon the land until Jackson receives a patent therefor, we would hesitate somewhat about affirming the judgment of the lower court, unless, after a careful review of the legal questions involved, we reached the conclusion that Jackson's qualifications to enter were beyond reasonable dispute; but we cannot agree with the contention of counsel that the removal of Black will jeopardize his rights in the land. It is alleged in the answer of Black that he settled upon the land about September 16th, 1893, and that he has resided thereon continuously since that date, and has valuable improvements upon the land. Under the law opening the Cherokee outlet to settlement, sec. 19, page 336, vol. 28, U. S. Stats. at Large, the right to make final proof for lands in the Cherokee outlet is extended to all *bona fide* settlers upon lands at the expiration of 14 months from the date of their settlement. This being the law, Black may at any time, if he so desires, make his final proof at the local land office, and although such proof will be rejected, yet it is all the law requires upon his part, and is sufficient to protect him against any stranger who initiates a right subsequent in point of time to that of his; and in case Jackson receives the patent, he can as well prosecute

his action to declare Jackson his trustee while off as upon the land.

31 For the reasons above stated the judgment of the trial court is affirmed. Tarsney, J., concurring; Bierer, J., presided at the hearing of the cause in the court below, not sitting; Keaton and McAtee dissenting.

32 Filed March 9th, 1898.

In the Supreme Court of the Territory of Oklahoma.

E. F. BLACK, Plaintiff in Error,
vs.
WALTER P. JACKSON, Defendant in Error. } Petition for Rehearing.

The plaintiff in error, E. F. Black, petitions the court for a rehearing and an opportunity to reargue and brief the above entitled case for the following reasons:

First. That the said decision of this court in the above-entitled cause amounts to an affirmance of the judgment of the lower court by an even division of the judges competent to sit, and does not at present amount to a precedent for other cases, while in fact this case was taken to the supreme court as a test case and with a view to carrying the same to the Supreme Court of the United States, if necessary, and involves the identical question arising in about thirty other cases in the county from which this case was taken by proceeding in error, and, in addition, the decision in this case by the two judges Dale and Tarsney is known to be contrary to the views of the former associate justice, the Honorable A. G. C. Bierer, which practically makes the same a minority decision.

Second. The court erred in finding and holding that the controversy between the parties hereto was originally one of prior settlement, as any question which might have existed upon the ground of prior settlement was fully and finally disposed of in the Land Department, and the sole question is the right of the defendant in error to oust the plaintiff in error from the possession of the land and deprive him of all means of conveying notice to any person who may hereafter and after relinquishment of the defendant in error has been filed in the land office make homestead entry

33 for and acquire title to the land.

Third. The court erred in finding and holding that Black's remedy is by making final proof for the land, because Black's homestead entry having been canceled, his application to make final proof would not be allowed, and even if he appealed from such holding and such appeal was allowed by the local office, the proceeding must at some time be determined, and the determination of such proceeding would reduce the same to a level with Black's former claims for the land, including his homestead entry, and the record of the Land Department would show that Black had no claim pending for the land, at which time Jackson could as well

relinquish and deprive Black of his rights as he can at the present time.

Fourth. The court erred in holding that equity will oust a man from the pos-session of land and either directly or indirectly extinguish his rights therein at the suit of one who has no legal title, and, as a plain proposition of law, never can acquire a legal title, and upon the admitted facts in the case has no intention of acquiring a legal title to the land, but, on the contrary, intends to get possession thereof and render Black helpless to give notice of his rights, and then relinquish for a consideration to a person, a stranger to Jackson's disqualification. The admitted facts in the record show that Jackson intends to and will transfer his wrongfully acquired possession of the land into a consideration of six thousand dollars; while, on the other hand, to leave Black upon the land where his possession would be notice to all of his rights cannot possibly result in injury or damage to Jackson.

In the case of H. W. Sanford, plaintiff in error, *vs.* C. W. Sanford, Book 35, Lawyer's Co-operative Edition U. S. Supreme Court
34 Reports, the Supreme Court of the United States, by Justice Field, uses the following language: "Where the officers of the Land Department have misconstrued the law and denied the parties their rights, or where misrepresentations and fraud have been practiced necessarily affecting their judgment, the courts can interfere so as to secure the just rights of the parties." The object and purpose of Black's contention was overlooked by this court and the law misconstrued in the controlling decision and settled law as laid down in the case of Cornelius *vs.* Kessel, Book 32, Lawyers' Co-operative Edition U. S. Reports, page 482, wherein it is held that where one has complied with the laws of the United States and done all that is required of him in the effort to acquire title to Government land, and his entry is canceled by the Land Department contrary to law, that he can maintain a suit in equity to have the title acquired by another person transferred to him, provided the person who acquired the title had notice of the rights of the first claimant. In this connection the court makes use of the following language: "The legal title, it is true, was retained by them (the United States), but they held it as trustee for the benefit of the purchaser, and they were bound upon proper application to issue to him a patent therefor. If from inadvertance or mistake as to their rights, or other cause, they afterwards conveyed that title to another, the grantee with notice took it subject to the equitable claim of the first purchaser, who could compel its transfer to him. In all such cases a court of equity will convert the second purchaser into a trustee of the true owner and compel him to convey the legal title." See also authorities cited in this case.

If the so-called mandatory injunction has a rightful foundation in necessity, an equally urgent necessity should either limit
35 its powers or extend in its support other principles of law and equity, so that wrong and injustice may not be done.

The court appears to have also overlooked or misconstrued the case of Laughlin *vs.* Fariss, decided by this court September the 3rd, 1897,

50 Pac., 254. See also authorities cited in dissenting opinion of Justice Bierer in the case of Sproat *vs.* Durlin, 2nd Okla., 45.

Fifth. The court erred in holding that possession of real estate is not notice of all the rights of the possessor, and that the question of notice in such cases depends upon the rules and laws of the Land Department, and therein overlooked the established law that possession of real estate is notice sufficient to put all persons upon inquiry and to charge them with notice of all the rights of the possessor which might have been ascertained by reasonable inquiry.

From the consideration of the original brief of plaintiff in error herein, together with the case of Smith *vs.* Townsend, Book 37, Lawyers' Co-operative Edition U. S. Reports, page 533, it must be entirely clear that Jackson can never acquire title to the land in question as a homesteader, and if such is the law he should not be assisted in his admitted attempt to rob Black of six thousand dollars, the value of the land, even though such effort be made in the broad and charitable name of equity. Even if it is not clear that Black will be entitled to the land as soon as the patent issues from the Government, by reason of the disqualification of Jackson, he ught to be permitted to maintain his existing rights so that he can finally submit the legal proposition to a court of equity with jurisdiction to finally determine the question.

Sixth. The two justices, Dale and Tarsney, in the opinion delivered in this case, close with the following language: "And
36 in case Jackson receives the patent he (Black) can as well prosecute his action to declare Jackson his trustee while off as upon the land." From this it is evident that the honorable justices misunderstood the controversy in this case. Black does not contend that he must be upon the land in order to entitle him to prosecute his action against Jackson after the patent issues—that is, I do not contend that Black's presence upon the land after patent issues is essential to maintain his action against the patentee, but his presence upon the land until the patent issues and he has had time to begin suit against the patentee is essential to preserve his right to maintain the suit and prevent the relinquishment by Jackson as set forth in the answer in the record, and the only injury that can possibly result to Jackson or any other person from granting the prayer of Black must result from Black's action commenced after the patent issues to acquire title to the home which he has improved and which should have been awarded to him by the Land Department and would have been so awarded if the law in relation to Jackson's qualification had been properly construed.

Wherefore plaintiff in error prays a rehearing and reconsideration of said cause and relief as demanded in his petition in error herein.

S. H. HARRIS,
Attorney for Plaintiff in Error.

I hereby accept service of the foregoing petition for rehearing

and acknowledge the receipt of a true copy this 5th day of March, 1898.

E. BEE GUTHREY,
Attorney for Defendant in Error.

Endorsed: Filed March 9th, 1898. Edgar W. Jones, clerk. K.

37 In the Supreme Court of the Territory of Oklahoma.

E. F. BLACK, Plaintiff in Error,
vs.
WALTER P. JACKSON, Defendant in Error. } No. 572.

Order.

Now, on this 11th day of June, A. D. 1898, said cause coming on for decision upon the application of the plaintiff in error for a rehearing, and the court having had said matter under advisement and being sufficiently advised in the premises—

It is therefore by the court considered, ordered, and decreed that said application for a rehearing be, and the same is hereby, overruled; to which ruling the said plaintiff in error duly excepted.

38 Endorsed: Filed June 23rd, 1898. Benj. F. Hegler, clerk sup. ct., by M. E. Ketsch, dep'y.

In the Supreme Court of the Territory of Oklahoma.

E. F. BLACK, Plaintiff in Error,
vs.
WALTER P. JACKSON, Defendant in Error. } No. 572. Petition for Appeal.

The above-named plaintiff in error, conceiving himself aggrieved by the several judgments entered in this case, to wit, the judgment entered herein on the twelfth day of February, A. D. 1898, confirming the judgment of the district court of the county of Kay and Territory of Oklahoma, in the premises, and also the judgment entered herein on the eleventh day of June, A. D. 1898, overruling the petition and application of the plaintiff in error for a rehearing, does hereby appeal from said orders and decrees and each and both of the same to the Supreme Court of the United States for the reasons specified in the assignment of errors, which is filed herewith, and he prays that this his appeal may be allowed and that a transcript of the record, proceedings, and papers upon which said orders were made, duly authenticated, may be sent to the Supreme Court of the United States, and that the court may fix the supersedeas bond of the said appellant to be given within a reasonable time, and enter all necessary orders herein allowing the foregoing appeal.

S. H. HARRIS AND
ASP, SHARTEL & COTTINGHAM,
Solicitors for Plaintiff in Error.

39 TERRITORY OF OKLAHOMA, } ss:
Supreme Court, }

S. H. Harris, of lawful age, being first duly sworn, upon his oath deposes and says that he is one of the attorneys in the above-entitled cause, and knows the nature of said controversy therein, and that there is more than five thousand dollars ($5,000.00) involved in said appeal, exclusive of costs.

S. H. HARRIS.

Subscribed in my presence and sworn to before me this twenty-third day of June, 1898.

[SEAL.] BENJ. F. HEGLER,
Clerk Supreme Court.

Endorsed: Filed June 23, '98. Benj. F. Hegler, clerk sup. ct., by M. E. Ketsch, dep'y.

40 In the Supreme Court of the Territory of Oklahoma.

E. F. BLACK, Plaintiff in Error,
vs.
WALTER P. JACKSON, Defendant in Error.

Affidavit.

TERRITORY OF OKLAHOMA, } ss:
Kay County, }

T. J. Harris, of lawful age, being first duly sworn, upon oath states that he is a resident of the county of Kay, Territory of Oklahoma; that he is well acquainted with the land in controversy in this action, and is well acquainted with the value of the relinquishment thereof and the value of relinquishments of and homestead filings upon said land and similar lands in the same locality; that the relinquishment of the homestead entry upon said land and the right to file a homestead entry thereon is well worth the sum of six thousand dollars ($6,000.00) and could readily be sold for that amount; that the actual amount in controversy in this action is the sum of six thousand dollars ($6,000.00).

T. J. HARRIS.

Subscribed and sworn to before me this 9th day of July, 1898.

[SEAL.] W. G. JONES,
Notary Public.

My com. exp. May 11th, 1902.

Endorsed: Filed July 13, '98. Benj. F. Hegler, clerk sup. ct.

41 In the Supreme Court of the Territory of Oklahoma.

E. F. BLACK, Plaintiff in Error,
vs.
WALTER P. JACKSON, Defendant in Error.

Affidavit.

TERRITORY OF OKLAHOMA, *Kay County,* } ss:

W. P. Franklin, of lawful age, being first duly sworn, upon his oath states that he is a resident of Kay county, Territory of Oklahoma, and has been such resident since the 16th day of September, 1893; that he is well acquainted with the land in question in this action, and is well acquainted with the value of the relinquishment of said land and similar lands in said county and Territory; that the relinquishment of the entry upon said land and the right to file a homestead entry thereon is now and has been since the commencement of this litigation well worth the sum of six thousand dollars ($6,000.00) and could readily be sold for that sum.

W. P. FRANKLIN.

Subscribed and sworn to before me this 9 day of July, 1898.

[SEAL.] W. G. JONES,
Notary Public.

My com. exp. May 11, 1902.

Endorsed: Filed July 13, 1898. Benj. F. Hegler, clerk sup. ct.

42 In the Supreme Court of the Territory of Oklahoma.

E. F. BLACK, Plaintiff in Error,
vs.
WALTER P. JACKSON, Defendant in Error.

Affidavit.

TERRITORY OF OKLAHOMA, *Kay County,* } ss:

J. Thomas, of lawful age, being first duly sworn, upon his oath states that he is a resident of Kay county, Territory of Oklahoma, and has been such resident since the 16th day of September, 1893; that he is well acquainted with the land in question in this action and is well acquainted with the value of the relinquishment of said land and similar lands in said county and Territory; that the relinquishment of the entry upon said land and the right to file a homestead entry thereon is now and has been since the commencement of this litigation well worth the sum of six thousand dollars ($6,000.00) and could readily be sold for that sum.

J. THOMAS.

Subscribed and sworn to before me this 9th day of July, 1898.

W. G. JONES,
Notary Public.

[SEAL.]

My com. exp. May 11, 1902.

Endorsed: — July 13, '98. Benj. F. Hegler, clerk sup. ct.

43 In the Supreme Court of the Territory of Oklahoma.

E. F. BLACK, Plaintiff in Error,
vs.
WALTER P. JACKSON, Defendant in Error.

Affidavit.

TERRITORY OF OKLAHOMA, *Kay County,* } *ss:*

J. R. Potts, of lawful age, being first duly sworn, upon oath states that he is a resident of the county of Kay, Territory of Oklahoma; that he is well acquainted with the land in controversy in this action and is well acquainted with the value of the relinquishment thereof and the value of the relinquishments of and homestead filings upon said land and similar lands in the same locality; that the relinquishment of the homestead entry upon said land and the right to file a homestead entry thereon is well worth the sum of six thousand dollars ($6,000.00), and could readily be sold for that amount; that the actual amount in controversy in this action is the sum of six thousand dollars ($6,000.00), which affiant has heard offered for the same.

J. R. POTTS.

Subscribed and sworn to before me this 9 day of July, 1898.

W. G. JONES,
Notary Public.

[SEAL.]

My com. exp. May 11, 1902.

Endorsed: Filed July 13, '98. Benj. F. Hegler, clerk sup. ct.

44 The foregoing claim of appeal is allowed in open court by order of court this twenty-third day of June, A. D. 1898.

JNO. H. BURFORD,
Chief Justice.

Attest:
[SEAL.] BENJ. F. HEGLER,
Clerk Sup. Ct.

In the Supreme Court of the Territory of Oklahoma.

E. F. BLACK, Plaintiff in Error,
vs.
WALTER P. JACKSON, Defendant in Error. } No. 572.

Assignment of Error on Appeal.

Now, on this twenty-third day of June, A. D. 1898, comes the said plaintiff in error, E. F. Black, by S. H. Harris and Asp, Shartel & Cottingham, his solicitors, and says that the decree entered in said cause on the twelfth day of February, A. D. 1898, affirming the judgment of the court below, and the decree of the eleventh day of June, A. D. 1898, entered therein respectively, are each and both erroneous and against the justice and rights of the said plaintiff in error for the following reasons, to wit:

45 First. The said court erred in affirming the judgment of the court below.

Second. The court erred in overruling the petition and application of the said plaintiff in error for a rehearing in said cause.

Third. Because the petition of the plaintiff in the court below did not state facts sufficient to entitle the plaintiff in the court below to the relief demanded.

Fourth. Because the court did not have jurisdiction to enter the decree complained of and had no right to assume jurisdiction to determine the rights of possession between different claimants of lands belonging to the United States, and had no right to assume jurisdiction to award the plaintiff the possession thereof or to dispossess the said defendant in the court below, and this court erred in sustaining the action of the court below in the premises.

Fifth. Because the land in controversy is public land belonging to the United States, and to which the United States has not parted with its title or in any way divested itself thereof, and because the court below erroneously assumed jurisdiction in the premises, and this court erroneously affirmed its said action.

Sixth. Because the said petition of the plaintiff and the answer of the defendant in the court below showed that the said plaintiff, the defendant in error in this court, was disqualified from acquiring any rights to the ownership or possession of the land in controversy, and that if the court otherwise possessed jurisdiction, having entered the lands opened to settlement in violation of law, he was a wrong-doer and entitled to no equitable relief.

Wherefore the said plaintiff in error prays that the said decrees and each of them be reversed, and that the said court may be directed to enter a decree reversing the said cause and re-

46 manding the same to the district court of the county of Kay and Territory of Oklahoma for further proceedings in accordance with law.

S. H. HARRIS AND
ASP, SHARTEL & COTTINGHAM,
Solicitors for Plaintiff in Error.

Indorsed: Filed June 23rd, '98. Benj. F. Hegler, clerk sup. ct., by M. E. Ketsch, deputy.

47 JUNE 23, 1898.

In the Supreme Court of the Territory of Oklahoma.

E. F. BLACK, Plaintiff in Error,
vs.
WALTER P. JACKSON, Defendant in Error. } No. 572.

Order.

Now, on this 23rd day of June, A. D. 1898, comes S. H. Harris and Asp, Shartel & Cottingham, solicitors for the plaintiff in error in this cause, and present to the court the application of the plaintiff in error for an appeal to the Supreme Court of the United States from the original judgment rendered herein affirming the judgment of the court below, and from the subsequent judgment or decree overruling and denying the application of the plaintiff in error for a rehearing thereon.

And the plaintiff in error having filed with said application for an appeal his assignment of errors and presented said application in open court, it is by the court ordered that the said appeal to the Supreme Court of the United States be, and the same is hereby, granted, and the clerk of this court is hereby directed to certify a full, true, and complete transcript of the record of this court to the Supreme Court of the United States.

And upon the further application of the said plaintiff in error that the amount of his supersedeas bond be fixed to supersede the judgment of this court in the premises, it is by the court ordered

48 that upon the giving of an undertaking in the sum of one thousand dollars ($1,000.00), to be approved by the chief justice of this court, within ten days from this date, the said appeal shall operate as a supersedeas, and the chief justice of this court is further directed to attest and sign the citation in said cause on such appeal.

JNO. H. BURFORD,
Chief Justice.

Endorsed: Filed June 23, '98. Benj. F. Hegler, clerk sup. ct.

49 In the Supreme Court of the Territory of Oklahoma.

E. F. BLACK, Plaintiff in Error,
vs.
WALTER P. JACKSON, Defendant in Error. } Undertaking on Appeal.

Know all men by these presents that we, E. F. Black, as principal, and J. E. Ritchey, John H. Pearce, B. K. Rinehart, Logan Wyatt, D. F. Sparks, Wm. Burns, A. White, T. K. Bell, and G. W. Riley, as sureties, are held and firmly bound unto the defendant, Walter P. Jackson, in the full and just sum of one thousand dollars ($1,000.00),

to be paid to the said Walter P. Jackson, his certain attorneys, executors, administrators, or assigns; to which payment, well and truly to be made, we bind ourselves, our heirs, executors, and administrators, jointly and severally by these presents.

Sealed with our seals and dated this 30th day of June, in the year of our Lord one thousand eight hundred and ninety-eight.

Whereas lately, at a session of the supreme court of the Territory of Oklahoma, in a suit depending in said court between E. F. Black, the plaintiff in error, and Walter P. Jackson, as defendant in error, a decree was rendered against the said E. F. Black, and the said E. F. Black having appealed therefrom to the Supreme Court of the United States, and having filed the said appeal in the office of the clerk of said court to reverse the said judgment in the aforesaid suit, and procured citation to issue to the said Walter P. Jackson, citing and admonishing him to be and appear at a session of the Supreme Court of the United States, to be holden at the city of Washington, on the twenty-third day of July next:

50 Now, the condition of the above obligation is such that if the said E. F. Black shall prosecute said appeal to effect and answer all damages and costs if he fail to make the said plea good, then the above obligation to be void; else to remain in full force and virtue.

Sealed and delivered in the presence of—

E. F. BLACK.
J. E. RICHEY.
JOHN H. PEARCE.
WM. BURNS.
A. WHITE.
T. K. BELL.
B. K. RINEHART.
LOGAN WYATT. $100.00.
D. F. SPARKS.
G. W. RILEY.

Approved July 2nd, 1898.

JNO. H. BURFORD,
Chief Justice.

Attest: BENJ. F. HEGLER,
Clerk Sup. Ct.,
By M. E. KETSCH,
[SEAL.] *Deputy.*

Endorsed on back as follows: 572. In the supreme court of the Territory of Oklahoma. E. F. Black, pl'ff in error, *vs.* Walter P. Jackson, def't in error. Undertaking on appeal. Filed July 2, '98. Benj. F. Hegler, clerk sup. ct., by M. E. Ketsch, deputy.

51 In the Supreme Court of the United States.

UNITED STATES OF AMERICA, *Supreme Court of Oklahoma,* } ss:

To Walter P. Jackson, Greeting:

You are hereby cited and admonished to be and appear at a session of the Supreme Court of the United States, to be held in the city of Washington, on the 23rd day of July next, pursuant to an appeal filed in the office of the clerk of the supreme court of the Territory of Oklahoma, wherein E. F. Black is appellant and you are appellee, to show cause, if any there be, why the judgment rendered against the said appellant, as in the said appeal mentioned, should not be corrected and why speedy justice should not be done to the parties.

Witness the Honorable Melville W. Fuller, Chief Justice of the United States, this twenty-third day of June, in the year of our Lord one thousand eight hundred and ninety-eight, and of the Independence of the United States of America the one hundred and twenty-third.

JNO. H. BURFORD,
Chief Justice of Oklahoma Territory.

Attest:
[SEAL.] BENJ. F. HEGLER, *Clerk.*

I hereby accept service of the foregoing citation this 24th day of June, 1898.

E. BEE GUTHREY,
Attorney for Walter P. Jackson.

Indorsed: Filed July 2, '98. Benj. F. Hegler, clerk sup. ct., by M. E. Ketsch, deputy.

52 UNITED STATES OF AMERICA, *Territory of Oklahoma,* } ss:

I, Benj. F. Hegler, clerk of the supreme court of the Territory of Oklahoma, do hereby certify the above and foregoing papers, numbered from one to 52, all numbers inclusive, to be a full, true, perfect, and complete transcript and copy of the record, papers, and proceedings, and of all thereof filed or had and entered of record in said court and in a certain cause lately in said court pending, wherein E. F. Black was plaintiff in error and Walter P. Jackson was defendant in error, as fully and completely as the same still remain on file or of record in my office at Guthrie, Oklahoma Territory.

I further certify that the original citation herein is hereto attached and herewith returned together with acceptance of service thereof duly endorsed thereon.

In testimony to the above I do hereunto sign my name and affix

the seal of said court, at Guthrie, in said Territory, this 14th day of July, 1898.

[Seal Supreme Court, Territory of Oklahoma.]

BENJ. F. HEGLER,
Clerk of the Supreme Court.

[Two-cent U. S. internal-revenue stamp, canceled July 14, 1898, B. F. H.]
[Two-cent U. S. internal-revenue stamp, canceled July 14, 1898, B. F. H.]
[Two-cent U. S. internal-revenue stamp, canceled July 14, 1898, B. F. H.]
[Two-cent U. S. internal-revenue stamp, canceled July 14, 1898, B. F. H.]
[Two-cent U. S. internal-revenue stamp, canceled July 14, 1898, B. F. H.]

53 In the Supreme Court of the United States.

UNITED STATES OF AMERICA, *Supreme Court of Oklahoma,* } *ss:*

To Walter P. Jackson, Greeting:

You are hereby cited and admonished to be and appear at a session of the Supreme Court of the United States, to be held in the city of Washington, on the twenty-third day of July next, pursuant to an appeal filed in the office of the clerk of the supreme court of the Territory of Oklahoma, wherein E. F. Black is appellant and you are appellee, to show cause, if any there be, why the judgment rendered against the said appellant, as in the said appeal mentioned, should not be corrected and why speedy justice should not be done to the parties.

Witness the Honorable Melville W. Fuller, Chief Justice of the United States, this twenty-third day of June, in the year of our Lord one thousand eight hundred and ninety-eight, and of the Independence of the United States of America the one hundred and twenty-third.

JNO. H. BURFORD,
Chief Justice of Oklahoma Territory.

[Seal Supreme Court, Territory of Oklahoma.]

Attest: BENJ. F. HEGLER, *Clerk.*

I hereby accept service of the foregoing citation this 24 day of June, 1898.

E. BEE GUTHREY,
Att'y for Walter P. Jackson.

Filed July 13, 1898.

BENJ. F. HEGLER,
Clerk Sup. Ct.

[Endorsed:] 572. In the Supreme Court of the United States. Citation to Walter P. Jackson. Filed July 2, '98. Benj. F. Hegler, clerk sup. ct., by M. E. Ketsch, deputy.

[Endorsed:] 572. E. F. Black, pl'ff in error, *vs.* Walter P. Jackson, def't in error. Transcript from supreme court, Oklahoma Territory.

Endorsed on cover: Case No. 16,936. Oklahoma Territory supreme court. Term No., 351. E. F. Black, appellant, *vs.* Walter P. Jackson. Filed July 29th, 1898.

TRANSCRIPT OF RECORD.

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1898.

No. 143

J. C. POTTS, APPELLANT,

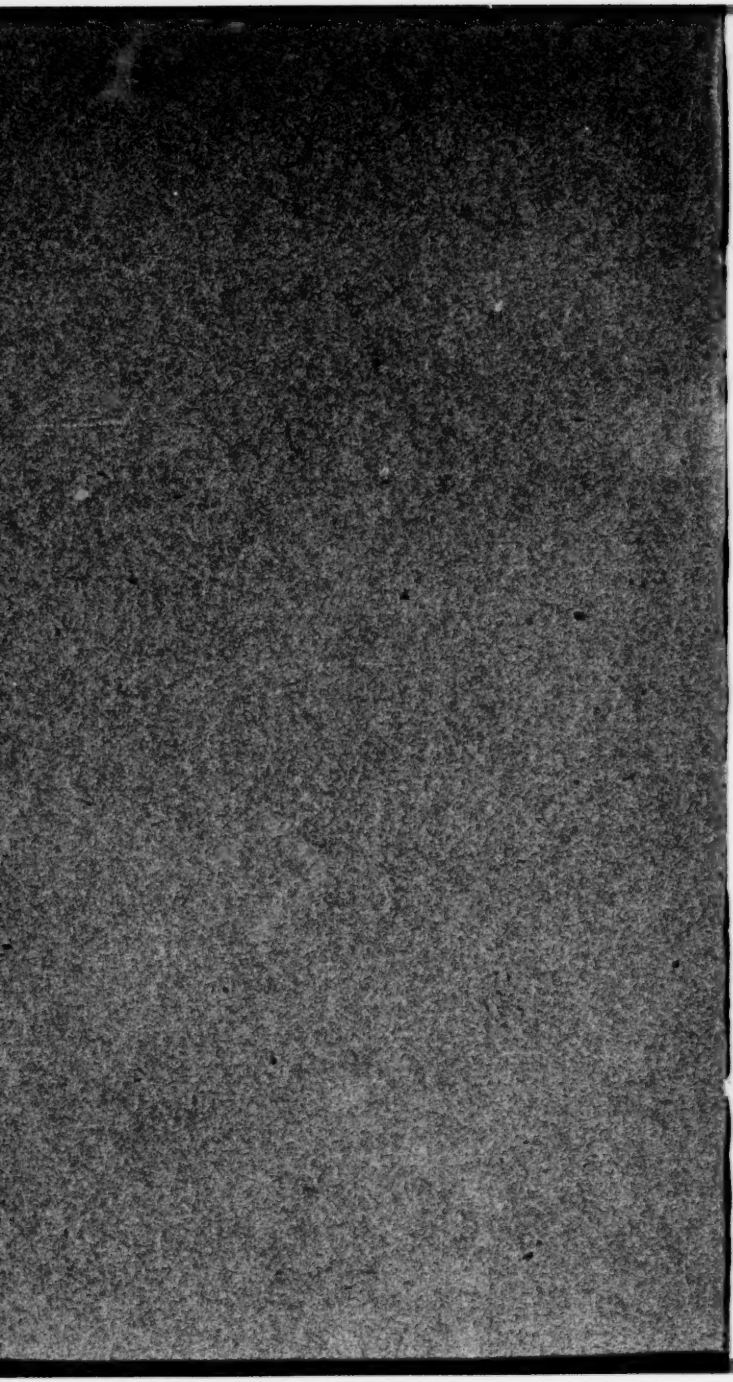
vs.

THOMAS N. HOLLEN.

APPEAL FROM THE SUPREME COURT OF THE TERRITORY OF OKLAHOMA.

FILED SEPTEMBER 28, 1898.

(17,006.)



(17,006.)

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1898.

No. 421.

J. C. POTTS, APPELLANT,

vs.

THOMAS N. HOLLEN.

APPEAL FROM THE SUPREME COURT OF THE TERRITORY OF OKLAHOMA.

INDEX.

	Original.	Print.
Caption	1	1
Petition in error	2	1
Waiver of summons and entry of appearance	3	1
Case-made from district court	3	2
Petition	4	2
Exhibit A—Receiver's receipt	8	4
B—Decision of Secretary of Interior, June 9, 1896	8	5
C—Amended affidavits of contest, Feb. 25, 1896	9	5
Summons issued, served, and returned	11	6
Motion to make petition more definite filed	11	6
Time given to file decision of Commissioner of General Land Office	11	6
Answer	11	7
Exhibit A—Motion for review before the Secretary of the Interior	13	8
Reply	15	9

JUDD & DETWEILER, PRINTERS, WASHINGTON, D. C., MAY 2, 1899.

	Original.	Print.
Evidence for plaintiff	15	9
Letter, Commissioner General Land Office to register and receiver, November 24, 1896	15	9
Testimony of Thos. N. Hollen	17	10
Demurrer to evidence	17	10
Judgment	18	11
Bond on appeal	20	12
Clerk's certificate	22	14
Attorneys' certificates	22	14
Judge's certificate to case-made	23	14
ıdgment	25	15
pinion	26	15
etition for rehearing	29	17
rder denying petition for rehearing	31	18
etition for appeal	32	18
ssignment of errors	34	19
rder allowing appeal	36	20
rder granting appeal and fixing bond	37	21
ond on appeal	38	22
itation (copy)	47	29
lerk's certificate	48	29

1 In the Supreme Court of the Territory of Oklahoma.

J. C. POTTS, Plaintiff in Error,
vs.
THOMAS N. HOLLEN, Defendant in Error. } No. 576.

UNITED STATES OF AMERICA,
Territory of Oklahoma, } *ss:*

Be it remembered that in the supreme court of the Territory of Oklahoma, at the city of Guthrie, in said Territory, at the times hereinafter mentioned, the following papers were filed and proceedings had in the above-entitled cause, to wit:

Petition in Error and Case-made, Thereto Attached as "Exhibit A."

2 No. 1.

In the Supreme Court of the Territory of Oklahoma.

J. C. POTTS, Plaintiff in Error,
vs.
THOMAS N. HOLLEN, Defendant in Error. } Petition in Error.

Plaintiff in error complains of defendant in error for that the said Thomas N. Hollen, at the February, 1897, term of the district court of Kay county, Oklahoma Territory, recovered a judgment by the consideration of said court against the said J. C. Potts in a certain action then pending in the said court, wherein the said Thomas N. Hollen was plaintiff and the said J. C. Potts was defendant. A certified transcript of the record of said court and the original case-made, duly certified and attested, is hereto attached and marked "Exhibit A" and made a part of this petition in error.

And the said J. C. Potts avers that there is manifest error in the said record and proceedings in this, to wit:

First.

In enjoining the said Potts off of said land when the rights of the said parties had not been finally adjudicated by the Land Department.

Second.

In overruling defendant's demurrer to the evidence.

Third.

In granting a mandatory injunction upon the pleadings.

(Signed) GEORGE J. MECHLING,
Att'y for Plaintiff in Error.

3 We, the attorneys of record for the defendant in error in the above-entitled action, hereby waive the issuance and

service of summons in the above-entitled cause and hereby enter a general appearance in said cause for the defendant in error therein.

Dated this 2nd day of April, 1897.

(Signed) BLEVINS & KING,
Att'ys for Defendant in Error.

Filed April 27th, 1897.

(Signed) EDGAR W. JONES, *Clerk.*

4 (2.)

TERRITORY OF OKLAHOMA, } ss:
County of Kay, }

In the District Court.

THOMAS N. HOLLEN, Plaintiff, }
vs. } Case-made.
J. C. POTTS, Defendant. }

Be it remembered that heretofore, to wit, on the 13th day of July, 1896, the plaintiff, Thomas N. Hollen, commenced his action against said defendant, J. C. Potts, by filing in the district court of Kay county his petition, which is in the words and figures following, to wit:

In the District Court of the 4th Judicial District within and for Kay County, Oklahoma Territory.

THOMAS N. HOLLEN, Plaintiff, }
vs. } Petition.
J. C. POTTS, Defendant. }

Now comes the above-named plaintiff and for cause of action against the above-named defendant states:

1st. That on the 13th day of October, 1893, he made homestead entry to the southeast quarter (¼) of section 32, township 28 north, of range 3 east, of I. M., in Perry land district, O. T., which land office then and there had jurisdiction over said tract and the officers of which had authority to make and allow said homestead entry, and that said entry was and is and has at all times been regularly and properly allowed under the rules of the Department of the Interior, and the same is entact upon the records of the land office, and a copy of receiver's duplicate receipt for same being hereto attached, marked "Exhibit A," and made a part hereof.

5 2nd. That there was filed in said land office at Perry, O. T., a certified affidavit of contest by J. C. Potts, defendant herein, and that under the allegations of said contest said cas- went to hearing on the 15th day of April, 1895, the proceedings — which are fully set out in a copy of the decision of said office and of General Land Office, under date of July 15th, 1895, which is hereby referred to and made a part hereof.

Third. That after the hearing of said contest a decision was ren-

dered in favor of plaintiff herein, and the contest case of the said J. C. Potts was dismissed, from which decision she failed to appeal within the time required by law, but did appeal the same on the 19th day of July, 1895, to the Commissioner of the General Land Office; that the same was not appealed within the time required by the rules of said office.

Fourth. That on the 15th day of July, 1895, the Commissioner of the General Land Office at Washington, D. C., affirmed the decision of the local land office at Perry, O. T., in deciding said case, and that on the 25th day of February, 1896, the defendant filed an amended contest affidavit before the Commissioner of the General Land Office, Washington, D. C, and that on the — day of ——, 1895, the said Commissioner rejected said affidavit and also motion for rehearing of the defendant.

Fifth. That upon the 29th day of July, 1896, the defendant herein appealed from said Commissioner's decision rejecting the amended affidavit and motion for rehearing and closing said case; that on the 9th day of June, 1896, the Hon. Secretary of *of* the Interior passed upon said case and affirmed the decision of the Commissioner in closing said case.

6 A copy of all the proceedings hereinabove mentioned are hereto attached and marked Exhibits "A," "B," "C," and "D."

And that all the proceedings before the Interior Department upon which the defendant is entitled to be heard with reference to said land contest have been had and the said case is now fully closed.

6th. That under and by virtue of his homestead entry the plaintiff therein is entitled to the exclusive use, benefit, and possession of all of the southeast quarter (¼) of section 32, township 28 north, of range 3 east.

7th. That under claim of right, based upon said contest so dismissed, the — J. C. Potts entered upon said quarter section and entered into possession of a part thereof, and erected or caused to be erected a house and other improvements thereon, and still maintains possession *there* of a portion of said quarter section under the protest and against the wishes of the plaintiff herein and without claim or color of title thereto.

And that the said J. C. Potts at this time has pending before the Department of the Interior no contest or claim or right or title to said tract or piece of land.

That the said J. C. Potts is insolvent and unable to respond in damages to this plaintiff, and her possessions of and improvements upon said tract prevent this plaintiff from properly cultivating and the use of that portion of the land in her possession.

That the said J. C. Potts threatens, by retaining the possession of a portion of said tract, to involve this plaintiff in many vexatious suits, to his great and irreparable damage and injury; that she has been in possession of a portion of said land since a short time after the opening of the Cherokee outlet; that this plaintiff has no adequate remedy at law.

7 That the defendant has used, cultivated, and controlled about 25 acres of said land, to his damage in the sum of one hundred and fifty dollars ($150.00); that the rents and profits of said land so used by said defendant would amount to about one hundred and fifty dollars ($150.00).

Wherefore the plaintiff prays that an order issue from this court restraining the said J. C. Potts and all her agents and employees from interfering with the said plaintiff's possession, use, and occupancy of the land included in the homestead entry numbered 2170, the same being the southeast quarter (¼) of section 32, township 28 north, of range 3 east.

That she be restrained from cultivating, improving, or occupying any portion of said tract, and that she — permitted within a certified time, to be fixed by the court, to remove therefrom any improvements which she may lay claim to and which have been constructed by her prior to and before the homestead entry made by this plaintiff; and that all such improvements as were placed upon said land by the defendant after the homestead entry of the plaintiff was made should be subject to rents, and all damages sustained by the plaintiff in the defendant's occupancy and use of said land, and to vacate said land on the order of the court, and for such other and further relief as to the court may seem just and proper.

THOMAS N. HOLLEN.

TERRITORY OF OKLAHOMA, } ss:
County of Kay, }

Thomas N. Hollen, being duly sworn according to law, on oath says that he has read the foregoing petition and knows the contents thereof, and that the stetements made therein are true.

(Signed) THOMAS N. HOLLEN.

8 Subscribed and sworn to before me this 13th day of July, A. D. 1896.

(Signed) F. M. BEALE,
Deputy Dist. Clerk.

(EX. A.)

4–138.

Receiver's duplicate receipt No. 2170; application No. 2170.

Homestead.

RECEIVER'S OFFICE, PERRY, O. T., *Oct.* 13, 1893.

Received of Thomas N. Hollen the sum of fourteen dollars, being the amount of fee and compensation of register and receiver for the entry of S. E. ¼ of sec 32, tw. 28 N., range 3 east, under section 2290, Revised Statutes of the United States.

$14.00. J. H. KING, *Receiver.*

Copy.

(Ex. B.)

Vol. 22, No. 1119.

DEPARTMENT OF THE INTERIOR, F. L. C. R. F. H.
WASHINGTON, *June* 9, 1896. G. B. G. R. W. H.

J. C. POTTS
vs.
THOMAS N. HOLLEN. } H. E. 2170. Contest.

Decision of July 10th, 1895, affirmed.

The Commissioners of the General Land Office.

SIR: J. C. Potts appeals from your office decision of July
9 10th, 1895, dismissing her contest against the homestead entry No. 2170, made by Thomas N. Hollen, for the S. E. ¼, sec. 32, tw. 28 N., range 3 east (I. M.), Perry land district, Oklahoma.

The facts are sufficiently stated in your said office decision. The decision complained of appears to be in accordance with the case of Welsh *vs.* Butler, decided by this department November 2nd, 1895 (21 L. D., page 369), and in accordance with the rule there announced your said decision appealed from is affirmed. The papers in the case are herewith returned.

Very respectfully,
(Signed) HOKE SMITH, *Secretary.*

(Ex. C.)

Amended Affidavit of Contest.

U. S. LAND OFFICE, PERRY, O. T., *February* 25, 1896.

Personally appeared before the undersigned A. C. Potts, of Kay county, Oklahoma Territory, who upon her oath says:

That she is well acquainted with the tract of land embraced in the homestead entry of Thomas N. Hollen, numbered 2170, upon the S. E. ¼ of sec. 32, tw. 28 N., R. 3 east, made Oct. 13th, 1893, at the U. S. land office at Perry, Okla., and knows and has known the condition of the same; also:

1st. That the said Thomas N. Hollen entered upon and occupied the lands known as the Cherokee outlet subsequent to date of the President's proclamation of August 19th, 1893, and prior to 12 o'clock noon, central standard time, of Sept. 16, 1893. This allegation is made on information and belief.

2nd. That the said J. C. Potts had the first improvements on said land, and had a house, a fence, consisting of posts and one wire, around the entire quarter sec. of land, and about one-fourth
10 acre thereof broken prior to the 13th of Oct., 1893, and prior to any improvements placed on said land by the said Thomas N. Hollen, and this the said contestant is ready to prove at such

time and place as may be named by the register and receiver for a hearing in said case, and she therefor asks to be allowed to prove said allegations, and that the said homestead entry No. 2170 may be declared canceled and forfeited to the United States, she, the contestant, paying the expenses of such hearing or such portion thereof as may be taxed to her.

her
J. C. x POTTS.
mark.

Witness- to mark:
ARISPEC POTTS &
J. R. POTTS.

Subscribed and sworn to before me this 25th day of February, 1896.

[SEAL.] FRANK B. APPERSON,
Notary Public.

Com. expires Dec. 18th, 1897.

Also, at the same time and place, appeared J. R. Potts, who, being duly sworn, deposes and says that he is acquainted with the tract of land described in the affidavit of J. C. Potts, and that he knows from personal observation that the statements therein made as to the improvements on said land are true, and that from statements made within the hearing of this affiant by the said Hollen he believes that the said Hollen entered the land known as the Cherokee outlet in violation of the President's proclamation of August 19th, 1893.

J. R. POTTS.

Sworn to and subscribed before me this 25th day of February, 1896.

[SEAL.] FRANK B. APPERSON,
Notary Public.

Com. expires Dec. 18, 1897

Address Mrs. J. C. Potts, Newkirk, Okla., Kay county.

11 The endorsements on the back of said petition *is* as follows, to wit: No. 629. Thomas N. Hollen *vs.* J. C. Potts. Petition. Filed July 13th, 1896. J. H. Havinghorst, clerk; F. M. Beale, dep. Blevins, King & Weir, att'ys for pl't'ff, Newkirk, O. T.

That afterwards, to wit, July 13th, 1896, a summons was issued, served, and returned July 15th, 1896.

And afterwards, to wit, August 4th, 1896, defendant filed her motion to make said petition more definite and certain.

And afterwards, to wit, August 11th, 1896, plaintiff was given 5 days in which said decision *on* the Commissioner of the General Land Office was filed, August, 1896.

And afterwards, to wit, on the 27th day of August, 1896, said defendant filed in said court her answer to said petition; which answer is in the words and figures following:

TERRITORY OF OKLAHOMA, } ss:
County of Kay, }

In the District Court.

THOMAS N. HOLLEN, Pl'nt'ff, }
vs. } Answer.
J. C. POTTS, Def't. }

Comes now the defendant and, for her answer to the plaintiff's petition herein filed, admits that defendant has the homestead entry on said land and, that defendant filed a contest against said entry, but denies each and every other material allegation therein contained.

2nd defence. Defendant, further answering, alleges that she filed a contest against the said entry of the said Hollen, charging and alleging in substance that plaintiff was disqualified to enter and hold lands by reason of having entered the Cherokee outlet prior to 12 o'clock noon of Sept. 16th, 1893, and run from the south
12 side of the Chillocco reservation, which is three and one-half miles south of the lines established in the President's proclamation; that said contest was rejected and defendant duly appealed, and while said cause was still pending defendant filed her amended affidavit of contest against said entry, a copy of which said contest is attached to plaintiff's petition, marked "Exhibit C," and hereby referred to and made a part of this answer.

Defendant further alleges that within the time required by the rules of practice in the Land Department, to wit, July 22, 1896, she filed a motion for a review of the Secretary's decision of June 9, 1896, a copy of which said motion is hereto attached, marked "Exhibit A," and made a part hereof; and that said cause is now and was pending at the commencement of this action in the Land Department of the United States.

Wherefore defendant prays that said action of plaintiff be dismissed, and that she have judgment for her costs.

GEORGE MECHLING,
Att'y for Def.

TERRITORY OF OKLAHOMA, } ss:
County of Kay, }

J. C. Potts, being duly sworn, on her oath says that she is the defendant in the above-entitled action; that she has read the foregoing answer and knows the contents thereof, and that the facts therein stated are true.

her
J. C. x POTTS.
mark.

Witness to mark:
ARISPA POTTS.

Subscribed and sworn to before me this 21 day of August, 1896.
FRANK B. APPERSON,
Notary Public.

My com. expires Dec. 18th, 1897.

13 (Ex. A.)

Before the Honorable Secretary of the Interior.

J. C. Potts
vs.
Thomas N. Hollen. } H. E. No. 2170, for the S. E. ¼ of sec. 32, tw. 28 N., of R. 3 east, I. M.

Motion for Review.

Comes now J. C. Potts, by her attorneys, Morgan & Pancoast, and asks for a review and reconsideration and the reversal of the decision rendered in the above-entitled cause June 9th, 1896, and as grounds for said motion alleges that the Hon. Secretary of the Interior erred in said decision as follows, to wit:

First. That said decision was contrary to the law and the rules and regulations of the Department of the Interior.

Second. That the Hon. Secretary erred in affirming said decisio of the Hon. Commissioner in said cause.

Third. That the Hon. Secretary erred in holding that the allegations made in the affidavit of contest were insufficient to warrant a hearing.

Fourth. The Hon. Secretary erred in not considering the amended affidavit filed by the contestant in February, 1896 (after the Commissioner's decision), which affidavit clearly charges:

(1st.) That the defendant entered upon and occupied portions o the Cherokee outlet subsequent to August 19, 1893, and prio
14 to 12 o'clock noon, central standard time, Sept. 16th, 1893.

(2nd.) That prior to the entry of the defendant the contestant had valuable improvements upon said tract of land, and tha the same were the first improvements upon said tract.

(3rd.) The Hon. Secretary erred in not ordering a hearing upon the allegations in said amended affidavit and returning said cause for a hearing thereon.

Respectfully submitted.

J. C. POTTS,
By MORGAN & PANCOAST, *Her Att'ys.*

We, the undersigned, attorneys of record for Thomas Hollen, hereby accept the service of the foregoing motion for review, and acknowledge the receipt of a true copy thereof this 22nd day of July, 1896.

JNO. OLIPHANT,
Att'y for Hollen.

Before the United States Land Office, Perry, O. T.

I, Dick T. Morgan, being first duly sworn, on my oath state that I am one of the attorneys for J. C. Potts; that the motion for review hereto attached is filed in good faith and not for the purpose of delay.

(Signed) DICK T. MORGAN.

Subscribed and sworn to before me this 22nd day of July, 1896.
LOUIS DAVIS, *Register.*

Said answer is endorsed on the back as follows: No. 629. Thomas N. Hollen *vs.* J. C. Potts. Answer. Filed August 27, 1896. J. H. Havinghorst, clerk, by F. M. Beale, dep. G. J. Mechling, for def.

15 And afterwards, to wit, January 8th, 1897, plaintiff filed his reply, which is in the word- and figures following:

In the District Court of Kay County, Oklahoma Territory.

THOMAS N. HOLLEN, Pl'nt'f,
vs.
J. C. POTTS, Def't. } Reply.

Comes now the plaintiff, by his attorneys, and denies each and every material allegation in the answer of defendant filed herein.
BLEVINS & KING,
Att'ys for Plaintiff.

And afterwards, to wit, March 3rd, 1897, said cause came on for hearing, and plaintiff, to sustain the issues, introduced the following testimony, to wit:

A letter of the Hon. Commissioner of the General Land Office, which is in the words and figures following:

"H." J. L. M. Docket A, Case 165. W. M. O. D., T. W. A.

DEPARTMENT OF THE INTERIOR,
GENERAL LAND OFFICE,
WASHINGTON, D. C., *November 24th*, 1896.

J. C. POTTS
vs.
T. N. HOLLEN.

Attempt to Amend Affidavit of Contest after Decision of this Office is Rendered.

Register & receiver, Perry, Okla.

SIRS: Thomas N. Hollen made H. E. No. 2170 for the S. E. ¼ sec. 32, tw. 28 N., R. 3 east, Perry land district, Oklahoma, against which J. C. Potts filed a contest, charging that Hollen entered into the Cherokee outlet from the southern boundary of the Chillocco School reservation. Said contest was dismissed by the local officers on April 15th, 1895, and an appeal being taken, the action below
16 was affirmed by this office on July 10th, 1895. A further appeal was filed; whereupon the department, on June 9th, 1896, affirmed the decision of this office.

A motion for review, alleging that the department erred, "in not considering the amended affidavit filed by the contestant in February, 1896 (after the Commissioner's decision), which affidavit clearly

charges (1) that the defendant entered upon and occupied portions of the Cherokee outlet subsequent to August 19th, 1896, and prior to 12 o'clock noon, central standard time, Sept. 16th, 1893."

You will find herewith a copy of the department decision of November 12, 1896, denying said motion in the following language:

"Your office could not, in rendering its decision, take into consideration facts of which it was not informed until afterward; that this department very properly held that said decision of your office, in view of the records before it, was correct. The allegation of having entered the Territory prior to noon of the day when the Territory was opened is an entirely different one from that of having entered it from the Chillocco School reservation, and one with which this department has nothing whatever to do until it has been passed upon by the proper authorities and brought here on appeal or in some other proper manner.

"The motion for review is therefore overruled. The affidavits referred to are herewith returned for such action as your office may deem proper in the premises."

The case is hereby closed, and you will advise said Potts that she may, if she elects, file a new contest against the entryman Hollen, incorporating — the charge set out in her amended affidavit in due time the action taken, transmitting therewith evidence of
17 notice hereof and of the decision of the department.

Respectfully, E. F. BEST,
Commissioner.

Served Dec. 22, 1896.

And plaintiff, to sustain the issues, introduced the following testimony:

Plaintiff, being called in his own behalf and being duly sworn, testifies as follows:

State your name.

Thomas N. Hollen.

Are you the plaintiff in this action?

I am.

You may state whether or not you have the homestead entry on the S. E. ¼ sec. 32, tw. 28 N., R. 3 east.

I have.

Objected to, as the records are the best evidence.

Is the defendant residing on said land?

She is.

How much of said land has she under her possession and control?

About 25 acres.

Was she residing on this land at the commencement of this action?

She was.

State whether or not you notified said defendant to vacate prior to the bringing of this action.

No; I did not.

Plaintiff rested, and defendant thereupon demurred to the evidence on the grounds:

1st. That the evidence did not sustain the allegations of the petition.

2nd. That the evidence did not show plaintiff to have a
18 cause of action.

Which said demurrer was overruled by the court and duly excepted to by defendant.

The defendant offered no testimony.

And thereupon the court made the orders and findings set forth in the journal entry, then and there reduced to writing and signed by the court; which journal entry, orders, and judgment of the court *is* in words and figures following:

In the District Court of Kay County, Oklahoma Territory.

THOMAS N. HOLLAND, Plaintiff,
vs.
J. C. POTTS, Defendant.

Journal Entry.

Now, on this day, this cause coming on for hearing and the plaintiff being present in person and by his counsel, Blevins & King, and the defendant being represented by her attorney, Geo. J. Mechling, and both parties announce themselves ready for trial; and thereupon plaintiff testified in his own behalf and rested, and defendant having demurred to said evidence, which said demurrer was overruled by the court and duly excepted to by the defendant, and the defendant failing to introduce any testimony, but standing on her demurrer, and after hearing the argument of counsel and being fully advised in the premises, the court finds that the plaintiff is entitled to a peremptory injunction, enjoining and restraining the defendant from interfering with his right to possess and control the southeast quarter of sec. 32, twp. 28 N., of range 3 east, of land in Kay county, Oklahoma. It is hereby ordered and adjudged that the defendant be enjoined and restrained from interfering with the plaintiff's rights to possess and use said land, except that the defendant is hereby given the right to enter upon and harvest the fall wheat crop she has sown upon the land in dispute, and is to
19 remove said wheat from said land within thirty days after the same is ripe and fit to cut; and is hereby enjoined off of said land completely, except as to the right to harvest her wheat sown thereon; and that she is hereby given thirty days to remove her property and improvements from said land from the date of this order; and she is further enjoined and restrained from removing, or interfering —, or injuring in any way any well of water that she may have placed upon said land, and all growing timber or trees that she may have placed upon said land, and any growing timber or trees that she may have planted.

To all of which orders and decrees the defendant duly excepted and excepts.

The defendant is hereby given thirty days to make a case for the Supreme Court; five days to the plaintiff to suggest amendments, and three days to settle the case-made, and ten days to file a bond for appeal, said bond to be in the sum of three hundred dollars ($300.00), woth good and sufficient sureties.

And in the event said defendant takes appeal in this case she is then to be confined and placed upon five acres of said land immediately around her said house in which she now resides; and the appeal to become effective must be filed in the Supreme Court within sixty days from this order, and that the plaintiff pay costs of this action to date.

To which order restricting defendant to five acres of land she duly excepted and excepts.

Dated this 3rd day of March, A. D. 1897.

A. G. C. BIERER, *Judge.*

O K.

GEORGE J. MECHLING,
Attorney for Defendant.

Said journal entry is endorsed on back as follows: 629. Hollon *vs.* Potts. Journal entry. Filed March the 6th. 1897. J. H. Havighorst, clerk, by W. C. Glenn, deputy. O K. Blevins & King, for pl'ff. O K. George J. Mechling, att'y for def.

20 And afterwards and on the 11th day of March, 1897, said defendant filed her bond for the stay of execution upon said judgment; which said bond was duly approved by the clerk of said court on the 11th day of March, 1897, and is in the words and figures following, to wit:

In the District Court of Kay County, Oklahoma Territory.

THOMAS N. HOLLEN, Pl'nt'ff,
vs.
J. C. POTTS, Defendant.

Undertaking on Appeal.

J. C. Potts, as principal, and —— —— and —— ——, as sureties, hereby acknowledge themselves bound to the plaintiff herein, Thomas N. Hollen, in the sum of three hundred dollars ($300.00), upon the following conditions:

Whereas the said plaintiff, on the 3rd day of March, 1897, recovered a judgment against the defendant, J. C. Potts, for an injunction removing said defendant from the premises described in plaintiff's petition in said action, and the court, at the time of rendering said judgment, further ordered and adjudged that said defendant be allowed sixty days within which to file an appeal in the supreme court of the Territory of Oklahoma for the reversal of said judgment,

and in case said appeal was so filed then the defendant to be allowed to retain the possession of five acres of said land immediately around her said house, in which she now resides, during the pendency of said appeal:

Now, therefore, if defendant shall duly prosecute her appeal on said action within the time limited by said order, and duly pay all costs that may be adjudged against her on said appeal, and duly comply with all orders or judgments of the court rendered therein, and pay to plaintiff all damages occasioned by the detention and occupancy of said five acres during the pendance of said action in case the judgment of the district court shall be finally affirmed, then this obligation to be void; otherwise to remain in full force and effect.

21 Witness our hands this 10th day of March, 1897.

her
J. C. x POTTS.
mark.
J. R. POTTS.
C. L. CUPPY.

Witness- to mark:
ARISPA POTTS.
J. R. POTTS.

Property Schedule.

J. R. Potts, being first duly sworn, on his oath deposes and says that he is a resident of the Territory of Oklahoma and of the county of Kay, and is worth the sum of $980.00, nine hundred and eighty dollars, over and above all his debts, liabilities, and exemptions and of property subject to execution under the laws of the Territory:

One horse, worth	$25.00
Harness & wagon, worth	50.00
Five head of cattle, worth	125.00
Twelve hundred bushel- corn (cribbed)	180.00
Five hundred dollars in notes, secured by chattel mortgage, worth	500.00
	980.00

J. R. POTTS.

Subscribed and sworn to before me this 10th day of March, A. D. 1897.

(Signed) F. M. BEALE, *D. D. Cl'k.*

Said bond is endorsed on the back as follows: No. 629. Thomas N. Hollen, plaintiff, *vs.* J. C. Potts, defendant. Undertaking on appeal. Filed and approved by me this 11th day of March, 1897. J. H. Havinghorst, clerk; F. M. Beale, dep.

22 TERRITORY OF OKLAHOMA, } ss:
County of Kay, }

I hereby certify that the foregoing copies of petition, answer, reply, journal entry, and undertaking on appeal are each and all true and exact copies of the originals now on file and of record in my office.

Dated this 8th day of April, 1897.

[SEAL.] J. H. HAVINGHORST,
Dist. Clerk.
F. M. BEALE, *Dep.*

The foregoing contains a true and correct statement and copy of all the pleadings, motions, orders, testimony, findings, and proceedings upon which judgment was rendered.

(Signed) GEORGE J. MECHLING,
Att'y for Def't.

We, the undersigned, attorneys for the plaintiff in the foregoing suit, hereby certify that the foregoing case-made and certified copy of record of proceedings in said case was duly served on *me* this 2nd day of April, 1897, and that the same contains a true and correct copy of all the pleadings, motions, orders, testimony, findings, and proceedings upon which judgment was rendered, as well as a true copy of all the orders of the court in reference thereto, as well as undertaking of defendant on appeal, and hereby *I* waive all time for submitting amendment to said case and certified record and agree that the same may be signed and settled without further notice.

BLEVINS & KING,
Att'ys for Plaintiff.

23 *Certificate.*

This is to certify that the foregoing case-made and the amendments thereto have been duly served in the due time and the same duly submitted to me for settlement and signing, as required by law, by the parties to said cause; that the same as above set forth and corrected by me is a true and correct statement of all the pleadings, motions, orders, findings, proceedings, and judgment had in this case, and I hereby settle, allow, and certify the same as true and correct, and hereby order that the clerk of the district court attest the same with the name and seal of said court and file the same of record as provided by the law.

Witness my hand, at Perry, Oklahoma, this 10th day of April, 1897.

[SEAL.] A. G. C. BIERER, *Judge.*

Attest: J. H. HAVINGHORST, *Clerk.*
F. M. BEALE, *Dep.*

24 Endorsed on back as follows: No. 576. In the supreme court of the Territory of Oklahoma. J. C. Potts, plaintiff in error, *vs.* Thomas N. Hollen, defendant in error. Petition in error, case-made, and waiver of issuance of summons. Filed April 27th, 1897. Edgar W. Jones, clerk. Filed April 14th, 1897. J. H. Hav-

inghorst, clerk; F. M. Beale, dep. George J. Mechling, Newkirk, O. T., att'y for pl't'ff in error.

25 And afterwards and on the 12th day of February said court duly made and entered a judgment in said cause in words and figures following, to wit:

(3.)

In the Supreme Court of the Territory of Oklahoma.

J. C. POTTS, Plaintiff in Error,
vs.
THOMAS N. HOLLEN, Defendant in Error. } No. 576. Journal.

The above cause coming on for disposition, the court being fully advised in the premises, it is considered, ordered, and adjudged that the same be in all things affirmed; to which the plaintiff in error excepts, and exception allowed.

26 And at the same time rendered a written opinion in words and figures following, to wit:

(4.)

(Supreme Court of Oklahoma, Feb. 12, 1898.)

POTTS
vs.
HOLLON.

Injunction—When properly granted.—A filed a homestead entry for a tract of Government land. B initiated a contest, alleging that A was disqualified from entering the land. The contest was by the Land Department decided in favor of A. During the pendency of such contest B filed an amended affidavit of contest, alleging a different ground of disqualification upon the part of A. Shortly after B first instituted the first contest, B in some manner became possessed of about 25 acres of the land, and held such possession until after the final decision upon the first contest. Held, that upon the authority of Sproat *vs.* Durland, 35 Pac., 682, 886, 2 Okl., 24, A was entitled to an injunction restraining B from interfering with the possession of A and requiring him to remove from the land in dispute. McAtee and Keaton, JJ., dissenting.

(Syllabus by the court.)

Appeal from district court, Kay county.

Action by Thomas Hollon against J. C. Potts for an injunction. Judgment for plaintiff, and defendant appeals. Affirmed.

George J. Mechling for appellant, John A. Oliphant for appellee.

DALE, *C. J.*:

This case comes here on appeal from Kay county to reverse the order of the district court in granting an injunction prohibiting

the appellant from further interfering with the possession of the appellee in a tract of land covered by the homestead entry of the latter, alleging insolvency on the part of appellee. Briefly stated, the facts are as follows:

On October 13, 1893, Hollon filed his homestead entry for the tract of land situated in Kay county, and afterwards Potts filed an affidavit of contest against Hollon upon the one ground of disqualification to enter the land by reason of Hollon's having entered the Cherokee outlet from the south line of the Chilocco reservation, 3½ miles south of the Kansas line. This contest was by the local land office and by the Commissioner of the General Land Office decided adversely to Potts. After the contest had been so decided in the local land office, and while the same was pending upon ap-

27 peal before the Commissioner of the General Land Office, Potts filed an amended contest affidavit, charging generally that Hollon was disqualified to enter the land by reason of having entered and occupied portions of the Cherokee outlet subsequently to August 19, 1893, and prior to 12 o'clock noon of September 16, 1893. At the time the original contest was being considered by the Commissioner of the General Land Office the amended contest was not before that tribunal, and upon such original contest proceedings the case was by the Commissioner of the General Land Office entirely closed and the contest dismissed. A motion for review was filed before the Commissioner of the General Land Office, and in such motion the fact was shown that prior to the date of the dismissal Potts had filled his amended contest affidavit. The only action upon the amended affidavit taken was simply to refer it to the local land office for their consideration.

It is claimed by the appellant that the court below erred in granting the injunction while the contest upon the amended affidavit was pending, and, further, that Hollon had slept upon his rights by permitting Potts to remain upon the land for a period of about three years before commencing the action to remove him, and in support of this contention is cited Proctor *v.* Stuart (Okl.), 46 Pac., 501.

Upon the first contention the decision of Sproat *v.* Durland, 2 Okl., 24; 35 Pac., 682, 886, governs. As a matter of law, Potts never had any rights as a settler upon the land. The contest was not based upon the grounds of prior settlement, but was made simply to secure a preferential right after the entry of Hollon should be canceled.

As to the second proposition advanced, this case presents an entirely different aspect from that before us in Proctor *vs.* Stuart, *supra*. In the case under consideration the original contest affidavit

28 by Potts was decided before the action to remove was instituted, and it is sought by filing a new contest and styling it an "amendment" to the original contest to retain possession. There are very many grounds of disqualification which may be alleged against a homestead entryman, and if a party were permitted to retain possession of his adversary's land during the lifetime of as many contests as he might bring, based upon the disqualification of an entryman, the children of the homestead settler would hardly live

long enough to dispossess such a contestant. We find no error in the decision, and the judgment of the lower court is affirmed.

The other justices concurring, except Bierer, J., who presided at the hearing of the cause in the court below, and McAtee and Keaton, JJ., dissenting.

29 (5.)

In the Supreme Court of the Territory of Oklahoma.

J. C. POTTS, Plaintiff in Error,
vs.
THOMAS N. HOLLAN, Defendant in Error. } Petition for Rehearing. Case No. 576.

Now comes the above-named plaintiff in error and petitions the court for a rehearing and reconsideration of the decision rendered in this cause for the following reasons:

First. That the court erred in sustaining the order of the trial court overruling the demurrer of plaintiff in error to the evidence of defendant in error, as an examination of the record will clearly disclose that no sufficient evidence was offered to authorize the judgment rendered, and from the journal entry of judgment made and entered by the trial court it appears that the court considered and was controlled by facts in no manner appearing in the evidence in said cause.

Second. That court erred and overlooked the established law of this court in allowing a mandatory injunction against plaintiff in error while the rights of the parties were still pending in the Land Department.

Third. The court erred and overlooked the controlling decision of Laughlin *vs.* Fariss, rendered in this court September 3, 1897, it appearing from the pleadings and evidence presented in this record that the defendant in error, plaintiff below, was in possession of the greater part of the land in question and had sufficient possession to comply with the requirements of the homestead laws of the United States, and that no necessity for remedy by injunction, either ordinary, mandatory, or "*pre*emptory," existed at the time of beginning the suit or at the time of trial. If defendant in error, plaintiff below,
30 had the right to maintain a suit for possession of the land in question or any part thereof, at the time this action was commenced, he had a plain, speedy, and adequate remedy at law, and for that reason the court had no jurisdiction to issue the order of injunction, and the judgment should have been given for the plaintiff in error instead of for the defendant in error.

Fourth. The court erred and overlooked the controlling decisions and established law in granting the mandatory injunction against defendant at the suit of defendant in error, who was disqualfied to take and hold the land in question by reason of having entered the same from the Chillocco School reservation, within the boundaries of the Cherokee outlet, at 12 o'clock noon of September 16, 1893. Defendant in error, at most, had a right to such possession as was necessary to protect himself under the laws of the United States,

and when he sought a remedy in the court beyond this interest he should be held to have submitted to the court his own right and qualification to maintain the action.

Wherefore plaintiff in error prays that she be granted a rehearing and reargument of said cause, and for relief as prayed for in her petition in error.

S. H. HARRIS AND
G. J. MECHLING,
Attorneys for Plaintiff in Error.

Service of a true copy of the foregoing petition accepted this 8th day of March, 1898.

E. BEE GUTHREY,
Att'y for Def. in Error.

Endorsed: Filed March 11, '98. Edgar W. Jones, clerk.

31 (6.)

In the Supreme Court of the Territory of Oklahoma.

J. C. POTTS, Plaintiff in Error,
vs.
THOMAS N. HOLLEN, Defendant in Error. } No. 576. Order.

Now, on this 10th day of June, 1898, this cause coming on for decision upon the application of the plaintiff in error for a rehearing, and the court having had said matter under advisement and being sufficiently advised in the premises—

It is therefore by the court considered, ordered, and decreed that said application for a rehearing be, and the same is hereby, overruled and denied; to which ruling the said plaintiff in error duly excepts.

32 (7.)

In the Supreme Court of the Territory of Oklahoma.

J. C. POTTS, Plaintiff in Error,
vs.
THOMAS N. HOLLEN, Defendant in Error. } Petition for Appeal. Case No. 576.

The above-named plaintiff in error, conceiving himself aggrieved by the several judgments entered in this case, to wit, the judgment entered herein on the 12 day of Feb'y, 1898, affirming the judgment of the district court of the county of Kay, of the Territory of Oklahoma, in the premises, and also the judgment rendered herein on the 10 day of June, 1898, overruling and denying the petition and application of the plaintiff in error for a rehearing, does hereby appeal from said orders and decrees, and each and both of the same, to the Supreme Court of the United States, for the reasons specified in the assignment of errors, which is filed herewith, and plaintiff in error alleges that the amount in controversy in this action exceeds

the sum of five thousand (5,000) dollars, and refers to the affidavits filed herewith as evidence thereof, and he prays that this his appeal may be allowed, and that the transcript of the record, proceedings, and papers upon which said orders were made, duly authenticated, may be sent to the Supreme Court of the United States, and that the court may fix the supersedeas bond of the said appellant, to be given within a reasonable time, and enter all necessary orders herein allowing the foregoing appeal.

JOHN W. SHARTEL AND
S. H. HARRIS,
Solicitors for Plaintiff in Error.

TERRITORY OF OKLAHOMA, *Supreme Court,* } ss:

S. H. Harris, of lawful age, being first duly sworn, upon his oath deposes and says that he is one of the attorneys in the above-
33 entitled cause and knows the nature of said controversy; that there is more than five thousand dollars involved in said appeal, exclusive of costs.

S. H. HARRIS.

Subscribed and sworn to before me this 2nd day of September, 1898.

CHAS. E. DENNIS,
[SEAL.] *Notary Public.*

My com. expires Nov. 24th, 1901.

Endorsed as follows: J. C. Potts *vs.* Thomas N. Hollen. Petition for appeal. Filed Sept. 3, 1898. Benj. F. Hegler, clerk sup. ct.

34 (8.)

In the Supreme Court of the Territory of Oklahoma.

J. C. POTTS, Plaintiff in Error,
vs.
THOS. N. HOLLEN, Defendant in Error. } No. 576.

Assignment of Error on Appeal.

Now, on this 4th day of September, 1898, comes the said plaintiff in error, J. C. Potts, by John W. Shartel and S. H. Harris, his solicitors, and says that the decree entered in said cause on the 12 day of Feb'y, 1898, affirming the judgment of the court below, and the decree entered in said cause on the 10 day of June, 1898, denying and refusing the petition of plaintiff in error for a rehearing, are each and both erroneous and against the justice and rights of the plaintiff in error for the following reasons, to wit:

First. That said supreme court erred in affirming the judgment of the court below.

Second. That said supreme court erred in denying the petition of plaintiff in error for a rehearing.

Third. Said court erred in holding that the petition of defendan in error in the court below stated facts sufficient to constitute a caus of action.

Fourth. Said supreme court erred in holding that the court belo had jurisdiction of the subject of said action and the right to ente tain the same as a proceeding in equity and without a trial by jur

Fifth. Said court erred in holding that the defendant in erro plaintiff in the trial court, was entitled to relief by mandatory i junction against plaintiff in error, defendant below, after said defen ant in the trial court had been permitted by plaintiff to remai upon said land for several years and expend money in the improv ment thereof by the implied consent of the said plaintiff.

35 Sixth. Said supreme court erred in holding that plainti in error was not entitled to remain in possession of said lan in order to give common-law notice of his rights and interes therein until such time as the title passed from the Government the United States to the said Hollen, plaintiff in error, thereby e abling him to commence an action against the said Hollen for t recovery of said land.

Seventh. Said supreme court erred in not holding and decidi that the said Hollen, defendant in error, was and is a "sooner" a disqualified to maintain the action in mandatory injunction, base solely upon his homestead entry, in the face of his admissions th he made the run into the Cherokee outlet from the Chilocco India School reservation at the hour of opening.

JOHN W. SHARTEL AND
S. H. HARRIS,
Solicitors for Plaintiff in Error.

Endorsed as follows: J. C. Potts *vs.* Thomas N. Hollen. Assig ment of error on appeal. Filed Sept. 3, 1898. Benj. F. Hegl clerk sup. ct.

36 (9.)

UNITED STATES OF AMERICA, }
Territory of Oklahoma. }

Supreme Court.

J. C. POTTS, Plaintiff in Error, }
vs. }
THOMAS N. HOLLEN, Defendant in Error. }

Now, on this 3d day of September, 1898, is presented the petiti for an appeal herein, and it appearing to the court that there is mo than five thousand (5,000) dollars involved in the appeal prayed f herein, exclusive of costs, and that plaintiff in error is entitled an appeal to the Supreme Court of the United States, as per t prayer of his petition,

It is therefore by the court ordered that the petition of plaint

in error for an appeal to the Supreme Court of the United States be allowed.

JNO. H. BURFORD,
Chief Justice.

Attest: BENJ. F. HEGLER,
[SEAL.] *Clerk Sup. Ct.*

Endorsed as follows: J. C. Potts, plaintiff in error, *vs.* Thos. N. Hollen, defendant in error. Order granting appeal. Filed Sept. 3, 1898. Benj. F. Hegler, clerk sup. ct.

37 (10.)

In the Supreme Court of the Territory of Oklahoma.

J. C. POTTS, Plaintiff in Error,
vs.
THOMAS N. HOLLEN, Defendant in Error. } Order. No. 576.

Journal Entry.

Now, on this 3d day of September, 1898, comes S. H. Harris and John W. Shartel, solicitors for the plaintiff in error in this court, and present to the court the application of the plaintiff in error for an appeal to the Supreme Court of the United States from the original judgment rendered herein affirming the judgment of the court below, and from the subsequent decree overruling the application of the plaintiff in error for a rehearing thereon, and the plaintiff in error having filed with said application for an appeal his assignment of errors and presented said application to the court, it is—

Ordered that said appeal to the Supreme Court of the United States be, and the same is hereby, granted, and the clerk of this court is hereby directed to certify a full, true, and complete transcript of the record of this court to the Supreme Court of the United States within 30 days from this date.

And upon further application of the plaintiff in error that the amount of his supersedeas bond be fixed to supersede the judgment of this court in the premises, it is by the court—

Ordered that upon the giving of an undertaking in the sum of one thousand (1,000) dollars, to be approved by the chief justice of said court within 20 days from this date, the said appeal shall operate as a supersedeas, and execution herein shall be stayed during said term of 20 days to allow the giving of said supersedeas bond.

JNO. H. BURFORD,
Chief Justice.

Attest: BENJ. F. HEGLER,
[SEAL.] *Clerk Supreme Court.*

Endorsed as follows: J. C. Potts, pl't'f in error, *vs.* Thomas N. Hollen, def't in error. Journal entry of order granting appeal and fixing bond. Filed Sept. 3, 1898. Benj. F. Hegler, clerk sup. ct.

38 (11.)

In the Supreme Court of the Territory of Oklahoma.

J. C. POTTS, Plaintiff in Error,
vs.
THOMAS N. HOLLEN, Defendant in Error. } Undertaking on Appeal.

Know all men by these presents that we, J. C. Potts, as principal, and J. R. Potts and T. J. Harris, D. F. Sparks, J. M. Barringer, J. B. Hart, T. K. Bell, A. J. Green, as sureties, are held and firmly bound unto the defendant, Thos. N. Hollen, in the full and just sum of one thousand (1,000) dollars, to be paid to the said Thos. N. Hollen, his certain attorneys, executors, administrators, and assigns; to which payment, well and truly to be made, we bind ourselves, our heirs, executors, and administrators, jointly and severally, by these presents.

Sealed with our seals and dated this 5 day of September, in the year of our Lord one thousand eight hundred and ninety-eight.

The conditions of the above and foregoing obligations are such as that whereas lately, at a session of the supreme court of the Territory of Oklahoma, in a suit pending in said court between J. C. Potts, plaintiff in error, and Thos. N. Hollen, defendant in error, a decree was rendered against the said J. C. Potts, and the said J. C. Potts having appealed therefrom to the Supreme Court of the United States, and having filed the said appeal in the office of the clerk of said court to reverse said judgment in the aforesaid suit, and procured citation to issue to the said Thos. N. Hollen, admonishing him to be and appear at a session of the Supreme Court of the United States to be holden in the city of Washington on the 3 day of October next:

39 Now, if the said J. C. Potts shall prosecute said appeal to effect and answer all damages and costs if she fail to make the said plea good, then the above obligation to be void; else to remain in full force and virtue.

her
MRS. J. C. x POTTS.
mark.
J. P. POTTS.
T. J. HARRIS.
D. F. SPARKS.
J. M. BARRINGER.
J. B. HART.
T. K. BELL.
A. J. GREEN.

Witness to mark:
GEO. J. MECHLING.
ARISPA POTTS.

The foregoing undertaking and sureties thereon approved by me this 21st day of September, 1898.

JNO. H. BURFORD,
Chief Justice.

[SEAL.]

Attest: BENJ. F. HEGLER,
Clerk Supreme Court.

Endorsed as follows: J. C. Potts, plaintiff in error, *vs.* Thos. N. Hollen, defendant in error. Bond. Filed Sept. 21, '98. Benj. F. Hegler, clerk sup. ct.

40 UNITED STATES OF AMERICA, } ss:
Territory of Oklahoma, County of Kay, }

J. C. POTTS, Plaintiff in Error,
vs.
THOMAS N. HOLLEN, Defendant in Error.

I, J. C. Potts, being first duly sworn according to law, on my oath *doth* depose and say that I am a resident of the county of Kay, in the Territory of Oklahoma; that I am of lawful age and a citizen of the United States; that I am a freeholder in the said Territory and a single man; that I further say that I am worth the sum of two hundred dollars ($200.00), consisting of the following property, located in the county of Kay, Territory of Oklahoma, and more particularly described as follows, to wit:

2 head of cattle, worth the sum of.....	$50.00
——, worth the sum of.....	
Promissory notes, secured by mortgages, worth the sum of.	400.00
——, worth the sum of.....	

That the property hereinbefore listed is unencumbered, except the following, to wit:

——, which is encumbered to the amount of.... .....
That all of my other debts amount to the sum of.....

And of the above-named property I claim as my exemptions—

——, worth the sum of..... ....
——, worth the sum of..... .. ..
——, worth the sum of..... ... ...

Total..... .... $450.00

I am the same person who signed the bond of the above-named defendant in the case of *the* J. C. Potts, plaintiff, *vs.* Thos. N. Hollen, defendant, case No. —.

J. P. POTTS.

Subscribed in my presence and sworn to before me, after the foregoing affidavit was read to him in full by me, this 5 day of Sept., A. D. 1898.

[SEAL.] W. G. JONES,
Notary Public.

My com. exp. May 11th, 1902.

41 UNITED STATES OF AMERICA, } ss:
Territory of Oklahoma, County of Kay, }

J. C. POTTS, Plaintiff in Error,
vs.
THOMAS N. HOLLEN, Defendant in Error.

I, T. J. Harris, being first duly sworn according to law, on my oath *doth* depose and say that I am a resident of the county of Kay, in the Territory of Oklahoma; that I am of lawful age and a citizen of the United States; that I am a freeholder in the said Territory and a married man; that I further say that I am worth the sum of five hundred dollars ($500.00), consisting of the following property, located in the county of Kay, Territory of Oklahoma, and more particularly described as follows, to wit:

1,000 bushels wheat, worth the sum of.....	$500.00
6 head of cattle, worth the sum of	240.00
3 gray mares, worth the sum of.....	300.
——, worth the sum of.....	

That the property hereinbefore listed is unencumbered, except the following, to wit:

——, which is encumbered to the amount of.....
That all of my other debts amount to the sum of.....

And of the above-named property I claim as my exemptions—

——, worth the sum of.....
——, worth the sum of.....
——, worth the sum of.....

Total..... $1,040.00

I am the same person who signed the bond of the above-named defendant in the case of *the* J. C. Potts, plaintiff, *vs.* Thos. N. Hollen, defendant, case No. —.

T. J. HARRIS.

Subscribed in my presence and sworn to before me, after the foregoing affidavit was read to him in full by me, this 5 day of Sept., A. D. 1898.

[SEAL.] W. G. JONES,
Notary Public.

My com. exp. May 11th, 1902.

42 UNITED STATES OF AMERICA, } ss:
Territory of Oklahoma, County of Kay, }

J. C. POTTS, Plaintiff in Error,
vs.
THOMAS N. HOLLEN, Defendant in Error.

I, D. F. Sparks, being first duly sworn according to law, on my oath *doth* depose and say that I am a resident of the county of Kay,

in the Territory of Oklahoma; that I am of lawful age and a citizen of the United States; that I am a freeholder in the said Territory and a married man; that I further say that I am worth the sum of one hundred dollars ($100.00), consisting of the following property, located in the county of Kay, Territory of Oklahoma, and more particularly described as follows, to wit:

500 bu. wheat, worth the sum of..... $250.00
——, worth the sum of.....
——, worth the sum of.....
——, worth the sum of.....

That the property hereinbefore listed is unencumbered, except the following, to wit:

——, which is encumbered to the amount of.....
That all of my other debts amount to the sum of.....

And of the above-named property I claim as my exemptions—

——, worth the sum of.....
——, worth the sum of.....
——, worth the sum of.....

Total..... $250.00

I am the same person who signed the bond of the above-named defendant in the case of *the* J. C. Potts, plaintiff, *vs.* Thos. N. Hollen, defendant, case No. —.

D. F. SPARKS.

Subscribed in my presence and sworn to before me, after the foregoing affidavit was read to him in full by me, this 7 day of Sept., A. D. 1898.

[SEAL.] W. G. JONES,
Notary Public.

My com. exp. May 11th, 1902.

43 UNITED STATES OF AMERICA, } *ss:*
Territory of Oklahoma, County of Kay, }

J. C. POTTS, Plaintiff in Error,
vs.
THOMAS N. HOLLEN, Defendant in Error.

I, J. M. Barringer, being first duly sworn according to law, on my oath *doth* depose and say that I am a resident of the county of Kay, in the Territory of Oklahoma; that I am of lawful age and a citizen of the United States; that I am a freeholder in the said Territory and a married man; that I further say that I am worth the sum of two hundred and fifty dollars ($250.00), consisting of the following property, located in the county of Kay, Territory of Oklahoma, and more particularly described as follows, to wit:

6 head of horses, worth the sum of $500.00
Real estate in the town of Newkirk, O. T., worth the sum of. 350.00
——, worth the sum of... .....
——, worth the sum of..... .....

That the property hereinbefore listed is unencumbered, except the following, to wit:

——, which is encumbered to the amount of.... .....
That all of my other debts amount to the sum of.....

And of the above-named property I claim as my exemptions—

——, worth the sum of.....
——, worth the sum of.... ... .
——, worth the sum of... .....

Total..... ... . $850.00

I am the same person who signed the bond of the above-named defendant in the case of *the* J. C. Potts, plaintiff, *vs.* Thos. N. Hollen, defendant, case No. —.

—— ——.

Subscribed in my presence and sworn to before me, after the foregoing affidavit was read to him in full by me, this 7 day of Sept., A. D. 1898.

[SEAL.] W. G. JONES,
Notary Public.

My com. exp. May 11th, 1902.

44 UNITED STATES OF AMERICA, } ss:
Territory of Oklahoma, County of Kay, }

J. C. POTTS, Plaintiff in Error,
vs.
THOMAS N. HOLLEN, Defendant in Error.

I, J. B. Hart, being first duly sworn according to law, on my oath *doth* depose and say that I am a resident of the county of Kay, in the Territory of Oklahoma; that I am of lawful age and a citizen of the United States; that I am a freeholder in the said Territory and a married man; that I further say that I am worth the sum of two hundred and fifty dollars ($250.00), consisting of the following property, located in the county of Kay, Territory of Oklahoma, and more particularly described as follows, to wit:

500 bu. wheat, worth the sum of..... $350.00
10 head of cattle, worth the sum of 250.00
——, worth the sum of... .....
——, worth the sum of..... ....

That the property hereinbefore listed is unencumbered, except the following, to wit:

——, which is encumbered to the amount of.... .....
That all of my other debts amount to the sum of. .....

And of the above-named property I claim as my exemptions—

——, worth the sum of..... ....
——, worth the sum of..... .....
——, worth the sum of.... ....

Total....: $600.00

I am the same person who signed the bond of the above-named defendant in the case of *the* J. C. Potts, plaintiff, *vs.* Thos. N. Hollen, defendant, case No. —.

J. B. HART.

Subscribed in my presence and sworn to before me, after the foregoing affidavit was read to him in full by me, this 7 day of Sept., A. D. 1898.

[SEAL.] W. G. JONES,
Notary Public.

My com. exp. May 11th, 1902.

45 UNITED STATES OF AMERICA, } ss:
Territory of Oklahoma, County of Kay, }

J. C. POTTS, Plaintiff in Error,
vs.
THOMAS N. HOLLEN, Defendant in Error.

I, T. K. Bell, being first duly sworn according to law, on my oath *doth* depose and say that I am a resident of the county of Kay, in the Territory of Oklahoma; that I am of lawful age and a citizen of the United States; that I am a freeholder in the said Territory and a married man; that I further say that I am worth the sum of one hundred dollars ($100.00), consisting of the following property, located in the county of Kay, Territory of Oklahoma, and more particularly described as follows, to wit:

4 head of horses, worth the sum of.. .... $200.00
500 bu. wheat in bin, worth the sum of..... ..... 250.00
——, worth the sum of..... .....
——, worth the sum of..... ....

That the property hereinbefore listed is unencumbered, except the following, to wit:

——, which is encumbered to the amount of..... ....
That all of my other debts amount to the sum of.....

And of the above-named property I claim as my exemptions—

——, worth the sum of.....
——, worth the sum of.....
——, worth the sum of.....

Total $450.00

I am the same person who signed the bond of the above-named defendant in the case of *the* J. C. Potts, plaintiff, *vs.* Thos. N. Hollen, defendant, case No. —.

T. K. BELL.

Subscribed in my presence and sworn to before me, after the foregoing affidavit was read to him in full by me, this 7 day of Sept., A. D. 1898.

[SEAL.] W. G. JONES,
Notary Public.

My com. exp. May 11th, 1902.

46 UNITED STATES OF AMERICA, } ss:
Territory of Oklahoma, County of Kay, }

J. C. POTTS, Plaintiff in Error,
vs.
THOMAS N. HOLLEN, Defendant in Error.

I, A. J. Green, being first duly sworn according to law, on my oath *doth* depose and say that I am a resident of the county of Kay, in the Territory of Oklahoma; that I am of lawful age and a citizen of the United States; that I am a freeholder in the said Territory and a married man; that I further say that I am worth the sum of two hundred and fifty dollars ($250.00), consisting of the following property, located in the county of Kay, Territory of Oklahoma, and more particularly described as follows, to wit:

1 pair of 3-year-old fillies, worth the sum of	$80.00
2 yearling colts, worth the sum of.....	40.00
House and lot in Newkirk, worth the sum of.....	450.00
1,000 bushels of wheat, worth the sum of.	500.00

That the property hereinbefore listed is unencumbered.

That all of my other debts amount to the sum of.....
And the above-named property is, over and above my exemptions, which *is* not included therein, worth the sum of.

Total ..... $

I am the same person who signed the bond of the above-named defendant in the case of *the* J. C. Potts, plaintiff, *vs.* Thos. N. Hollen, defendant, case No. —.

A. J. GREEN.

Subscribed in my presence and sworn to before me, after the foregoing affidavit was read to him in full by me, this 17th day of Sept., A. D. 1898.

[SEAL.] W. G. JONES,
Notary Public.

My com. exp. May 11th, 1902.

[Endorsed:] No. 576. Justification of surety on bond. J. C. Potts *vs.* Tho. N. Hollen. Filed this 21st day of Sept. Benj. F. Hegler, clerk sup. ct.

47 (12.)

In the Supreme Court of the United States.

UNITED STATES OF AMERICA, *Supreme Court of Oklahoma,* } *ss:*

To Thos. N. Hollen, Greeting:

You are hereby cited and admonished to be and appear at a session of the Supreme Court of the United States, to be held in the city of Washington on the 3rd day of October next, pursuant to an appeal filed in the office of the clerk of the supreme court of the Territory of Oklahoma, wherein J. C. Potts is appellant and you are appellee, to show cause, if any there be, why the judgment rendered against the said appellant, as in the said appeal mentioned, should not be corrected and why speedy justice should not be done to the parties.

Witness the Honorable Melville W. Fuller, Chief Justice of the United States, this 3d day of September, in the year of our Lord one thousand eight hundred and ninety-eight, and of the Independance of the United States of America the one hundred and twenty-third.

JNO. H. BURFORD,
Chief Justice of Oklahoma Territory.

Attest:
[SEAL.] BENJ. F. HEGLER, *Clerk.*

I hereby accept service of the foregoing citation this 17th day of September, 1898.

E. BEE GUTHREY,
Attorney for Thos. N. Hollen.

Endorsed as follows: J. C. Potts, pl't'f in error, *vs.* Thomas N. Hollen, def't in error. Citation and acceptance — service thereof. Filed Sept. 22, 1898. Benj. F. Hegler, clerk sup. ct.

48 (13.)

UNITED STATES OF AMERICA, *Territory of Oklahoma,* } *ss:*

I, Benjamin F. Hegler, clerk of the supreme court of the Territory of Oklahoma, do hereby certify that the above and foregoing papers, numbered from one to 13, all numbers inclusive, to be a full, true,

and perfect and complete transcript and copy of the record, papers, and proceedings and of all thereof filed or had and entered of record in said court in a certain case lately in said court pending, wherein J. C. Potts was plaintiff in error and Thos. N. Hollen was defendant in error, as full and complete as the same still remain on file or of record in my office, at Guthrie, Oklahoma Territory.

I further certify that the original citation herein is hereto attached and herewith returned, together with acceptance of service thereof, duly endorsed thereon by the attorney of record for the defendant in error.

In testimony to the above I do hereunto sign my name and affix the seal of said court, at Guthrie, in said Territory, this 24th day of September, 1898.

[Seal Supreme Court, Territory of Oklahoma.]

BENJ. F. HEGLER,
Clerk of the Supreme Court.

[Endorsed:] No. 576. J. C. Potts, appellant, *vs.* Thomas N. Hollen, appellee.

Endorsed on cover: Case No. 17,006. Oklahoma Territory supreme court. Term No., 421. J. C. Potts, appellant, *vs.* Thomas N. Hollen. Filed September 28th, 1898.

Supreme Court U. S.
FILED
OCT 23 1899
JAMES H. McKENNEY,
Clerk.

No. 107.

Brief of Starkel for Appellant.

Filed October 23, 1899.

Supreme Court of the United States.

OCTOBER TERM, 1899.

No. 107.

General No. 16936.

E. F. BLACK, Appellant,
vs.
WALTER P. JACKSON, Appellee.

BRIEF OF APPELLANT.

JOHN W. STARKEL,
AND S. H. HARRIS,
Attorneys for Appellant.

IN THE

Supreme Court of the United States.

OCTOBER TERM, 1899.

No. 107.

General No. 16936.

E. F. BLACK, Appellant,
vs.
WALTER P. JACKSON, Appellee.

BRIEF OF APPELLANT.

STATEMENT OF FACTS.

This case originated in the district court of the county of Kay and territory of Oklahoma. The petition, styled "Application for Mandatory Injunction," alleges that the plaintiff has a homestead entry or the southwest quarter of section twenty-six, township twenty-eight, range two, east of the Indian meridian, and that prior to the date of making the plaintiff's homestead entry defendent E F. Black had made homestead entry thereof, but which entry, previous to the making of the plaintiff's entry, had been held by the final action of the secretary of the interior for cancellation pursuant to a contest instituted against the same by the plaintiff upon

the claim of prior settlement alleged to have been made by the plaintiff; that the plaintiff's entry or filing was made under a preference right resulting to him thereby to make such entry; that notwithstanding the action of the interior department the defendant is in possession of the west half of the tract covered by the plaintiff's entry, and that the defendant refuses to surrender possession of the same and has the tract in his possession fenced with a barb wire fence, with other improvements thereon of a permanent character, and that the defendent is financially irresponsible.

The prayer of the petition is that the plaintiff have a mandatory injunction enjoining the defendant from entering upon or in any manner retaining possession of the said land so held by him. (See printed record, page 4, for copy of petition, with exhibits attached.)

The defendant answered to the petition, but by leave of court withdrew the same and filed a demurrer which contained the following, among other grounds: (1) "That the document termed 'an application for a mandatory injunction' does not state facts sufficient to constitute a cause of action (2) and that the court has no jurisdiction of the subject of the action sought to be presented herein." (See printed record, p. 7.) This demurrer was by the court overruled and an exception taken to this ruling. (See printed record, p 8.) There upon the defendant filed his amended answer admitting that the defendant had a prior entry or filing covering the entire tract of land in controversy; that the same had been held by the final action of the secretary of the interior for cancellation pursuant to the contest instituted against the same by the plaintiff upon the ground that the plaintiff was the prior settler. The answer charges that the lands in controversy constituted a part of the country known as the "Cherokee Outlet," opened to settlement on the 16th of September, 1893; that it

was the admitted and found facts of the case that the plaintiff and defendant both settled on the land on the day in question, but that the plaintiff's settlement was prior to that of the defendant; that both plaintiff and defendant started for the land in controversy at the hour of noon and at the time fixed by the proclamation on the day of the opening, but that it was both found and admitted throughout the proceedings in the interior department that the defendant had started to the lands in controversy at the hour of opening from the 100-foot strip set apart therefor on the south line of the state of Kansas and that the plaintiff started from a point three and one half miles south of the south line of the state of Kansas, and from the south line of a tract reserved from settlement for the purpose of the Chilocco Indian industrial school, and that plaintiff was within the said Chilocco reservation previous to the hour of opening said country to settlement, and that the controversy in the land department presented the naked legal question as to whether the plaintiff disqualified himself from acquiring any title to the lands in controversy by reason of having unlawfully entered such lands in violation of the act opening the same to settlement or of the proclamation of the president issued in pursuance thereof, and that it was admitted and found by the land department that the prior settlement of the plaintiff resulted from the advantage secured by him by reason of having three and one half miles the start in making the race to the land in controversy.

It is alleged that the reservation for the Chilocco Indian industrial school is a part of the inhibited territory and that the plaintiff as a matter of law disqualified himself from acquiring title to any such lands by reason of having entered the same previous to the hour of opening the Cherokee Outlet to settlement. The answer further alleges that it is the plaintiff's intention,

as soon as he succeeds in dispossessing said defendant from said land, to relinquish his e try upon the same and permit another to make entry thereof for the purpose of depriving the defendant of the right upon the plaintiff's making final proofs of bringing an action to charge him as a trustee of such title for the use and benefit of the plaintiff upon the ground of a misapplication of the law to the found and admitted facts developed in the proceedings before the land department and that the attempt to dispossess the defendaut of such land is to facilitate the passing of the entry to another as a means of depriving the defendant of the ultimate right to the land in question. The answer offers on the part of the defendant to execute to the plaintiff a good and sufficient bond to compensate him for all loss and damage occasioned by his retention of the occupancy of that portion of the premises which he had already reduced to possession (see printed record, p. 8.)

To this answer the plaintiff demurred orally upon the ground that the answer does not state facts sufficient to constitute a defense to plaintiff's petition, and the court sustained such demurrer. An exception was duly preserved and the defendant elected to stand upon his answer. (See printed record, p. 12.) The court thereupon entered a decree, the relief granted being expressed in the following words: "It is further ordered and adjudged by the court that the defendant be and he is hereby enjoined from in any manner entering upon the premises described in the plaintiff's application for injunction or exercising any further control or possession over the same except for the purpose of removing his improvements from the same, and defendant is given thirty days within which to move all of his movable improvements, including buildings and fences, from said premises."

To this decree a petition in error was filed in the

IN THE

Supreme Court of the United States.

OCTOBER TERM, 1899.

No. 107.

General No. 16936.

E. F. BLACK, Appellant,
vs.
WALTER P. JACKSON, Appellee.

BRIEF OF APPELLANT.

STATEMENT OF FACTS.

This case originated in the district court of the county of Kay and territory of Oklahoma. The petition, styled "Application for Mandatory Injunction," alleges that the plaintiff has a homestead entry on the southwest quarter of section twenty-six, township twenty-eight, range two, east of the Indian meridian, and that prior to the date of making the plaintiff's homestead entry defendent E F. Black had made homestead entry thereof, but which entry, previous to the making of the plaintiff's entry, had been held by the final action of the secretary of the interior for cancellation pursuant to a contest instituted against the same by the plaintiff upon

the claim of prior settlement alleged to have been made by the plaintiff; that the plaintiff's entry or filing was made under a preference right resulting to him thereby to make such entry; that notwithstanding the action of the interior department the defendant is in possession of the west half of the tract covered by the plaintiff's entry, and that the defendant refuses to surrender possession of the same and has the tract in his possession fenced with a barb wire fence, with other improvements thereon of a permanent character, and that the defendent is financially irresponsible.

The prayer of the petition is that the plaintiff have a mandatory injunction enjoining the defendant from entering upon or in any manner retaining possession of the said land so held by him. (See printed record, page 4, for copy of petition, with exhibits attached.)

The defendant answered to the petition, but by leave of court withdrew the same and filed a demurrer which contained the following, among other grounds: (1) "That the document termed 'an application for a mandatory injunction' does not state facts sufficient to constitute a cause of action (2) and that the court has no jurisdiction of the subject of the action sought to be presented her in." (See printed record, p. 7.) This demurrer was by the court overruled and an exception taken to this ruling. (See printed record, p 8.) There upon the defendant filed his amended answer admitting that the defendant had a prior entry or filing covering the entire tract of land in controversy; that the same had been held by the final action of the secretary of the interior for cancellation pursuant to the contest instituted against the same by the plaintiff upon the ground that the plaintiff was the prior settler. The answer charges that the lands in controversy constituted a part of the country known as the "Cherokee Outlet," opened to settlement on the 16th of September, 1893; that it

was the admitted and found facts of the case that the plaintiff and defendant both settled on the land on the day in question, but that the plaintiff's settlement was prior to that of the defendant; that both plaintiff and defendant started for the land in controversy at the hour of noon and at the time fixed by the proclamation on the day of the opening, but that it was both found and admitted throughout the proceedings in the interior department that the defendant had started to the lands in controversy at the hour of opening from the 100-foot strip set apart therefor on the south line of the state of Kansas and that the plaintiff started from a point three and one half miles south of the south line of the state of Kansas, and from the south line of a tract reserved from settlement for the purpose of the Chilocco Indian industrial school, and that plaintiff was within the said Chilocco reservation previous to the hour of opening said country to settlement, and that the controversy in the land department presented the naked legal question as to whether the plaintiff disqualified himself from acquiring any title to the lands in controversy by reason of having unlawfully entered such lands in violation of the act opening the same to settlement or of the proclamation of the president issued in pursuance thereof, and that it was admitted and found by the land department that the prior settlement of the plaintiff resulted from the advantage secured by him by reason of having three and one half miles the start in making the race to the land in controversy.

It is alleged that the reservation for the Chilocco Indian industrial school is a part of the inhibited territory and that the plaintiff as a matter of law disqualified himself from acquiring title to any such lands by reason of having entered the same previous to the hour of opening the Cherokee Outlet to settlement. The answer further alleges that it is the plaintiff's intention,

as soon as he succeeds in dispossessing said defendant from said land, to relinquish his entry upon the same and permit another to make entry thereof for the purpose of depriving the defendant of the right upon the plaintiff's making final proofs of bringing an action to charge him as a trustee of such title for the use and benefit of the plaintiff upon the ground of a misapplication of the law to the found and admitted facts developed in the proceedings before the land department and that the attempt to dispossess the defendaut of such land is to facilitate the passing of the entry to another as a means of depriving the defendant of the ultimate right to the land in question. The answer offers on the part of the defendant to execute to the plaintiff a good and sufficient bond to compensate him for all loss and damage occasioned by his retention of the occupancy of that portion of the premises which he had already reduced to possession (see printed record, p. 8.)

To this answer the plaintiff demurred orally upon the ground that the answer does not state facts sufficient to constitute a defense to plaintiff's petition, and the court sustained such demurrer. An exception was duly preserved and the defendant elected to stand upon his answer. (See printed record, p. 12) The court thereupon entered a decree, the relief granted being expressed in the following words: "It is further ordered and adjudged by the court that the defendant be and he is hereby enjoined from in any manner entering upon the premises described in the plaintiff's application for injunction or exercising any further control or possession over the same except for the purpose of removing his improvements from the same, and defendant is given thirty days within which to move all of his movable improvements, including buildings and fences, from said premises."

To this decree a petition in error was filed in the

IN THE

Supreme Court of the United States.

OCTOBER TERM, 1899.

No. 107.

General No. 16936.

E. F. BLACK, Appellant,
vs.
WALTER P. JACKSON, Appellee.

BRIEF OF APPELLANT.

STATEMENT OF FACTS.

This case originated in the district court of the county of Kay and territory of Oklahoma. The petition, styled "Application for Mandatory Injunction," alleges that the plaintiff has a homestead entry on the southwest quarter of section twenty-six, township twenty-eight, range two, east of the Indian meridian, and that prior to the date of making the plaintiff's homestead entry defendent E F. Black had made homestead entry thereof, but which entry, previous to the making of the plaintiff's entry, had been held by the final action of the secretary of the interior for cancellation pursuant to a contest instituted against the same by the plaintiff upon

the claim of prior settlement alleged to have been made by the plaintiff; that the plaintiff's entry or filing was made under a preference right resulting to him thereby to make such entry; that notwithstanding the action of the interior departmcnt the defendant is in possession of the west half of the tract covered by the plaintiff's entry, and that the defendant refuses to surrender possession of the same and has the tract in his possession fenced with a barb wire fence, with other improvements thereon of a permanent character, and that the defendent is financially irresponsible.

The prayer of the petition is that the plaintiff have a mandatory injunction enjoining the defendant from entering upon or in any manner retaining possession of the said land so held by him. (See printed record, page 4, for copy of petition, with exhibits attached.)

The defendant answered to the petition, but by leave of court withdrew the same and filed a demurrer which contained the following, among other grounds: (1) "That the document termed 'an application for a mandatory injunction' does not state facts sufficient to constitute a cause of action (2) and that the court has no jurisdiction of the subject of the action sought to be presented her in." (See printed record, p. 7.) This demurrer was by the court overruled and an exception taken to this ruling. (See printed record, p 8) There upon the defendant filed his amended answer admitting that the defendant had a prior entry or filing covering the entire tract of land in controversy; that the same had been held by the final action of the secretary of the interior for cancellation pursuant to the contest instituted against the same by the plaintiff upon the ground that the plaintiff was the prior settler. The answer charges that the lands in controversy constituted a part of the country known as the "Cherokee Outlet," opened to settlement on the 16th of September, 1893; that it

was the admitted and found facts of the case that the plaintiff and defendant both settled on the land on the day in question, but that the plaintiff's settlement was prior to that of the defendant; that both plaintiff and defendant started for the land in controversy at the hour of noon and at the time fixed by the proclamation on the day of the opening, but that it was both found and admitted throughout the proceedings in the interior department that the defendant had started to the lands in controversy at the hour of opening from the 100-foot strip set apart therefor on the south line of the state of Kansas and that the plaintiff started from a point three and one half miles south of the south line of the state of Kansas, and from the south line of a tract reserved from settlement for the purpose of the Chilocco Indian industrial school, and that plaintiff was within the said Chilocco reservation previous to the hour of opening said country to settlement, and that the controversy in the land department presented the naked legal question as to whether the plaintiff disqualified himself from acquiring any title to the lands in controversy by reason of having unlawfully entered such lands in violation of the act opening the same to settlement or of the proclamation of the president issued in pursuance thereof, and that it was admitted and found by the land department that the prior settlement of the plaintiff resulted from the advantage secured by him by reason of having three and one half miles the start in making the race to the land in controversy.

It is alleged that the reservation for the Chilocco Indian industrial school is a part of the inhibited territory and that the plaintiff as a matter of law disqualified himself from acquiring title to any such lands by reason of having entered the same previous to the hour of opening the Cherokee Outlet to settlement. The answer further alleges that it is the plaintiff's intention,

as soon as he succeeds in dispossessing said defendant from said land, to relinquish his e try upon the same and permit another to make entry thereof for the purpose of depriving the defendant of the right upon the plaintiff's making final proofs of bringing an action to charge him as a trustee of such title for the use and benefit of the plaintiff upon the ground of a misapplication of the law to the found and admitted facts developed in the proceedings before the land department and that the attempt to dispossess the defendaut of such land is to facilitate the passing of the entry to another as a means of depriving the defendant of the ultimate right to the land in question. The answer offers on the part of the defendant to execute to the plaintiff a good and sufficient bond to compensate him for all loss and damage occasioned by his retention of the occupancy of that portion of the premises which he had already reduced to possession (see printed record, p. 8.)

To this answer the plaintiff demurred orally upon the ground that the answer does not state facts sufficient to constitute a defense to plaintiff's petition, and the court sustained such demurrer. An exception was duly preserved and the defendant elected to stand upon his answer. (See printed record, p. 12) The court thereupon entered a decree, the relief granted being expressed in the following words: "It is further ordered and adjudged by the court that the defendant be and he is hereby enjoined from in any manner entering upon the premises described in the plaintiff's application for injunction or exercising any further control or possession over the same except for the purpose of removing his improvements from the same, and defendant is given thirty days within which to move all of his movable improvements, including buildings and fences, from said premises."

To this decree a petition in error was filed in the

IN THE

Supreme Court of the United States.

OCTOBER TERM, 1899.

No. 107.

General No. 16936.

E. F. BLACK, Appellant,
vs.
WALTER P. JACKSON, Appellee.

BRIEF OF APPELLANT.

STATEMENT OF FACTS.

This case originated in the district court of the county of Kay and territory of Oklahoma. The petition, styled "Application for Mandatory Injunction," alleges that the plaintiff has a homestead entry on the southwest quarter of section twenty-six, township twenty-eight, range two, east of the Indian meridian, and that prior to the date of making the plaintiff's homestead entry defendent E F. Black had made homestead entry thereof, but which entry, previous to the making of the plaintiff's entry, had been held by the final action of the secretary of the interior for cancellation pursuant to a contest instituted against the same by the plaintiff upon

the claim of prior settlement alleged to have been made by the plaintiff; that the plaintiff's entry or filing was made under a preference right resulting to him thereby to make such entry; that notwithstanding the action of the interior department the defendant is in possession of the west half of the tract covered by the plaintiff's entry, and that the defendant refuses to surrender possession of the same and has the tract in his possession fenced with a barb wire fence, with other improvements thereon of a permanent character, and that the defendent is financially irresponsible.

The prayer of the petition is that the plaintiff have a mandatory injunction enjoining the defendant from entering upon or in any manner retaining possession of the said land so held by him. (See printed record, page 4, for copy of petition, with exhibits attached.)

The defendant answered to the petition, but by leave of court withdrew the same and filed a demurrer which contained the following, among other grounds: (1) "That the document termed 'an application for a mandatory injunction' does not state facts sufficient to constitute a cause of action (2) and that the court has no jurisdiction of the subject of the action sought to be presented herein." (See printed record, p. 7.) This demurrer was by the court overruled and an exception taken to this ruling. (See printed record, p 8.) There upon the defendant filed his amended answer admitting that the defendant had a prior entry or filing covering the entire tract of land in controversy; that the same had been held by the final action of the secretary of the interior for cancellation pursuant to the contest instituted against the same by the plaintiff upon the ground that the plaintiff was the prior settler. The answer charges that the lands in controversy constituted a part of the country known as the "Cherokee Outlet," opened to settlement on the 16th of September, 1893; that it

was the admitted and found facts of the case that the plaintiff and defendant both settled on the land on the day in question, but that the plaintiff's settlement was prior to that of the defendant; that both plaintiff and defendant started for the land in controversy at the hour of noon and at the time fixed by the proclamation on the day of the opening, but that it was both found and admitted throughout the proceedings in the interior department that the defendant had started to the lands in controversy at the hour of opening from the 100-foot strip set apart therefor on the south line of the state of Kansas and that the plaintiff started from a point three and one half miles south of the south line of the state of Kansas, and from the south line of a tract reserved from settlement for the purpose of the Chilocco Indian industrial school, and that plaintiff was within the said Chilocco reservation previous to the hour of opening said country to settlement, and that the controversy in the land department presented the naked legal question as to whether the plaintiff disqualified himself from acquiring any title to the lands in controversy by reason of having unlawfully entered such lands in violation of the act opening the same to settlement or of the proclamation of the president issued in pursuance thereof, and that it was admitted and found by the land department that the prior settlement of the plaintiff resulted from the advantage secured by him by reason of having three and one half miles the start in making the race to the land in controversy.

It is alleged that the reservation for the Chilocco Indian industrial school is a part of the inhibited territory and that the plaintiff as a matter of law disqualified himself from acquiring title to any such lands by reason of having entered the same previous to the hour of opening the Cherokee Outlet to settlement. The answer further alleges that it is the plaintiff's intention,

as soon as he succeeds in dispossessing said defendant from said land, to relinquish his e try upon the same and permit another to make entry thereof for the purpose of depriving the defendant of the right upon the plaintiff's making final proofs of bri ging an action to charge him as a trustee of such title for the use and benefit of the plaintiff upon the ground of a misapplication of the law to the found and admitted facts developed in the proceedings before the land department and that the attempt to dispossess the defendaut of such land is to facilitate the passing of the entry to another as a means of depriving the defendant of the ultimate right to the land in question. The answer offers on the part of the defendant to execute to the plaintiff a good and sufficient bond to compensate him for all loss and damage occasioned by his retention of the occupancy of that portion of the premises which he had already reduced to possession (see printed record, p. 8.)

To this answer the plaintiff demurred orally upon the ground that the answer does not state facts sufficient to constitute a defense to plaintiff's petition, and the court sustained such demurrer. An exception was duly preserved and the defendant elected to stand upon his answer. (See printed record, p. 12) The court thereupon entered a decree, the relief granted being expressed in the following words: "It is further ordered and adjudged by the court that the defendant be and he is hereby enjoined from in any manner entering upon the premises described in the plaintiff's application for injunction or exercising any further control or possession over the same except for the purpose of removing his improvements from the same, and defendant is given thirty days within which to move all of his movable improvements, including buildings and fences, from said premises."

To this decree a petition in error was filed in the

IN THE

Supreme Court of the United States.

OCTOBER TERM, 1899.

No. 107.

General No. 16936.

E. F. BLACK, Appellant,
vs.
WALTER P. JACKSON, Appellee.

BRIEF OF APPELLANT.

STATEMENT OF FACTS.

This case originated in the district court of the county of Kay and territory of Oklahoma. The petition, styled "Application for Mandatory Injunction," alleges that the plaintiff has a homestead entry on the southwest quarter of section twenty-six, township twenty-eight, range two, east of the Indian meridian, and that prior to the date of making the plaintiff's homestead entry defendent E F. Black had made homestead entry thereof, but which entry, previous to the making of the plaintiff's entry, had been held by the final action of the secretary of the interior for cancellation pursuant to a contest instituted against the same by the plaintiff upon

the claim of prior settlement alleged to have been made by the plaintiff; that the plaintiff's entry or filing was made under a preference right resulting to him thereby to make such entry; that notwithstanding the action of the interior department the defendant is in possession of the west half of the tract covered by the plaintiff's entry, and that the defendant refuses to surrender possession of the same and has the tract in his possession fenced with a barb wire fence, with other improvements thereon of a permanent character, and that the defendent is financially irresponsible.

The prayer of the petition is that the plaintiff have a mandatory injunction enjoining the defendant from entering upon or in any manner retaining possession of the said land so held by him. (See printed record, page 4, for copy of petition, with exhibits attached.)

The defendant answered to the petition, but by leave of court withdrew the same and filed a demurrer which contained the following, among other grounds: (1) "That the document termed 'an application for a mandatory injunction' does not state facts sufficient to constitute a cause of action (2) and that the court has no jurisdiction of the subject of the action sought to be presented her in." (See printed record, p. 7.) This demurrer was by the court overruled and an exception taken to this ruling. (See printed record, p 8.) Thereupon the defendant filed his amended answer admitting that the defendant had a prior entry or filing covering the entire tract of land in controversy; that the same had been held by the final action of the secretary of the interior for cancellation pursuant to the contest instituted against the same by the plaintiff upon the ground that the plaintiff was the prior settler. The answer charges that the lands in controversy constituted a part of the country known as the "Cherokee Outlet," opened to settlement on the 16th of September, 1893; that it

was the admitted and found facts of the case that the plaintiff and defendant both settled on the land on the day in question, but that the plaintiff's settlement was prior to that of the defendant; that both plaintiff and defendant started for the land in controversy at the hour of noon and at the time fixed by the proclamation on the day of the opening, but that it was both found and admitted throughout the proceedings in the interior department that the defendant had started to the lands in controversy at the hour of opening from the 100-foot strip set apart therefor on the south line of the state of Kansas and that the plaintiff started from a point three and one half miles south of the south line of the state of Kansas, and from the south line of a tract reserved from settlement for the purpose of the Chilocco Indian industrial school, and that plaintiff was within the said Chilocco reservation previous to the hour of opening said country to settlement, and that the controversy in the land department presented the naked legal question as to whether the plaintiff disqualified himself from acquiring any title to the lands in controversy by reason of having unlawfully entered such lands in violation of the act opening the same to settlement or of the proclamation of the president issued in pursuance thereof, and that it was admitted and found by the land department that the prior settlement of the plaintiff resulted from the advantage secured by him by reason of having three and one half miles the start in making the race to the land in controversy.

It is alleged that the reservation for the Chilocco Indian industrial school is a part of the inhibited territory and that the plaintiff as a matter of law disqualified himself from acquiring title to any such lands by reason of having entered the same previous to the hour of opening the Cherokee Outlet to settlement. The answer further alleges that it is the plaintiff's intention,

as soon as he succeeds in dispossessing said defendant from said land, to relinquish his e .try upon the same and permit another to make entry thereof for the purpose of depriving the defendant of the right upon the plaintiff's making final proofs of bringing an action to charge him as a trustee of such title for the use and benefit of the plaintiff upon the ground of a misapplication of the law to the found and admitted facts developed in the proceedings before the land department and that the attempt to dispossess the defendaut of such land is to facilitate the passing of the entry to another as a means of depriving the defendant of the ultimate right to the land in question. The answer offers on the part of the defendant to execute to the plaintiff a good and sufficient bond to compensate him for all loss and damage occasioned by his retention of the occupancy of that portion of the premises which he had already reduced to possession (see printed record, p. 8.)

To this answer the plaintiff demurred orally upon the ground that the answer does not state facts sufficient to constitute a defense to plaintiff's petition, and the court sustained such demurrer. An exception was duly preserved and the defendant elected to stand upon his answer. (See printed record, p. 12) The court thereupon entered a decree, the relief granted being expressed in the following words: "It is further ordered and adjudged by the court that the defendant be and he is hereby enjoined from in any manner entering upon the premises described in the plaintiff's application for injunction or exercising any further control or possession over the same except for the purpose of removing his improvements from the same, and defendant is given thirty days within which to move all of his movable improvements, including buildings and fences, from said premises."

To this decree a petition in error was filed in the

Supreme Court of the United States.

OCTOBER TERM, 1899,

No. 107.

E. F. BLACK,
Appellant,
vs.
WALTER P. JACKSON,
Appellee.

APPEAL FROM THE SUPREME COURT OF OKLAHOMA TERRITORY.

MOTION TO DISMISS APPEAL.

Comes now the said Walter P. Jackson by his attorney of record, and moves this Honorable Court to dismiss the appeal herein: *First*, because this Court has no jurisdiction of said appeal, the subject-matter of controversy being the right of the possession of a certain homestead in Oklahoma Territory, the title to which is still in the United States; *Secondly*, because there is no sufficient allegation in the

pleadings, nor any proof, showing the actual money value of said possession: and *Thirdly*, because the actual value of the land, with a clear and unclouded title, the possession of which is involved, is not of sufficient value to give this Court jurisdiction, nor is there anything involved in said appeal of which this Court can take jurisdiction.

FRED BEALL,
Attorney for Walter P. Jackson.

BRIEF IN SUPPORT OF ABOVE MOTION.

STATEMENT.

The statement of facts, as set out on pages 1 to 5 in the brief for appellant, is in the main correct, but not wholly so. The statement at the bottom of page 3 and top of page 4, that "the answer further alleges that it is the plaintiff's intention, as soon as he succeeds in dispossessing said defendant from said land, to relinquish his entry upon the same, and permit another to make entry thereof, for the purpose of depriving the defendant of the right upon the plaintiff's making final proof of bringing an action to charge him as trustee," etc., is not entirely correct.

The allegation in the answer is:

"Defendant further says that, if he is ejected from said land and his home and improvements thereon by order of this court, he verily *believes*. and so states the fact to be, that said plaintiff will relinquish to the Government of the United States, for a valuable consideration, all his claim to and interest in said land, and that the same will be entered as a homestead by some other person qualified to enter and hold the same and a stranger to the disqualification and wrongful acts of the plaintiff herein.

"That said land, with the improvements thereon by this defendant, *could be transferred, in the manner aforesaid, for the sum of $6,000.00.*"

The appellant filed, with his petition for appeal, the affidavit of his counsel, Mr. S. H. Harris, to the effect that he "knows the nature of said controversy therein, and that there is more than $5,000 involved in said appeal, exclusive of costs." Rec., 23.

Four other affidavits were filed with the clerk of the Supreme Court of Oklahoma, 20 days after the appeal had been allowed by the Chief Justice. Rec., 23–25.

These last affidavits are to the effect "That the relinquishment of the homestead entry upon said land, *and the right to file* a homestead entry thereon is well worth the sum of $6,000; that the actual amount in controversy in this action is the sum of $6,000."

The appellee has filed in this court the following affidavit:

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1898.

No. 351.

E. F. BLACK, *Appellant*,

vs.

WALTER P. JACKSON, *Appellee*.

Personally appeared before me, N. T. Smith, a notary public in and for Kay County, Oklahoma Territory, H. S.

Braucht, Charles C. Cuppy, W. A. Ellis, W. M. Ferguson, H. E. Farnsworth, Ove Harris, J. M. Haynes, Frank Pierce, Madison Pierce, E. W. Schafer, George I. Taylor, H. J. Welch, and Walter P. Jackson, each and all of whom are well and personally known to me to be reputable and credible citizens of said County and Territory, and each and all after being duly sworn by me, severally depose and say, each for himself, that he resides in, and is a permanent citizen of Kay County, Oklahoma Territory, that he is personally acquainted with the Southwest Quarter of Section Twenty-Six, Township Twenty-Eight, north of range two east, Indian Meridian, in said County and Territory, and knows the character of said land, the improvements thereon, and all the surroundings thereof, and that in his opinion the full value of said entire quarter section of land, with all the improvements thereon has not been at any time during the present year, of 1898, and is not now, greater than thirty-five hundred dollars, and at no time during the present year could said land have been sold for more than thirty-five hundred dollars in cash had the vendor been able to have conveyed the same by an absolutely perfect warranty title; and that in their opinion the west eighty acres, or west half of said quarter section, upon which the said E. F. Black resides, as set out in the original petition of said appellee, Walter P. Jackson, is not now, and has not been at any time during the present year of 1898 of greater value than seventeen hundred and fifty dollars, and could not with a perfect title have been sold for more than said last named sum at any time during the present year. And said affiants each and all further depose and say that the said H. J. Welch is the present Tax Assessor of Newkirk Township, County of Kay, and the said J. M. Haynes is the present Treasurer and Tax Collector of said County, and the said Frank Pierce is the present Sheriff of said County, and the said Madison Pierce is the present Deputy

Sheriff of said County, and the said Ove Harris is the present County Clerk of said County, and the said Walter P. Jackson is the appellee in said above styled cause.

H. S. BRAUCHT.
C. L. CUPPY.
W. A. ELLIS.
H. E. FARNSWORTH.
J. M. HAYNES,
Treasurer and Tax Collector.
H. J. WELCH,
Tax Assessor.
W. M. FERGUSON.
E. W. SCHAFER.
OVE HARRIS,
County Clerk.
W. F. PIERCE,
Sheriff.
MADISON PIERCE,
Deputy Sheriff.
GEORGE I. TAYLOR.

W. P. JACKSON,
Appellee.

Subscribed and sworn to before me this 4th day of October, 1898, in Kay County, Oklahoma Territory, and I certify that my commission as Notary Public will expire on the 21st day of February, 1899.

N. T. SMITH,
Notary Public. [SEAL.]

ARGUMENT.

The title to the land, the possession of one-half of which is involved in this controversy, is still in the United States. Of course the title cannot, so long as it remains vested in the United States, be the subject of jurisdiction of any court. The Land Department has the exclusive jurisdiction to determine, in the first instance, all questions as to the right to the title to the land. The Department has, in a contest between the parties to this suit, adjudged that Jackson has the first and ~~supreme~~ superior right to Black to make entry of the land, and accordingly can-

celled Black's entry thereon, and permitted Jackson to make entry. It yet remains for Jackson to show compliance with the homestead laws by continued residence, cultivation and improvement, which will entitle him under the law to a patent to said land, upon the payment of the price fixed thereon by Congress.

In order to make entry of said land Jackson was required to make affidavit as follows:

"That my said application is honestly and in good faith made for the purpose of actual settlement and cultivation, and not for the benefit of any other person, persons, or corporation," etc. 26 Stats., 1093.

The Land Department found in the contest between the parties, that Jackson did make a settlement in good faith on the land on September 16, 1893, and that he had followed up his settlement with residence on and cultivation and improvement of the land as required by law.

See decision of the Secretary of the Interior, Rec., 3 & 4.

As against that record, and the good faith of Jackson, the appellant set up in his answer to the petition of Jackson, that he *believed* that Jackson would for a valuable consideration relinquish his entry, and that some other person would enter the land. He does not aver that Jackson had threatened to relinquish, nor does he state any fact upon which his *belief* is based. He then avers that the land and appellant's improvements thereon "*could be transferred*" for $6,000 and there is the foundation for the jurisdiction of this Court.

Twelve creditable citizens of the County, including the Sheriff, a deputy sheriff, the Tax Assessor, and County Clerk, and the Tax Collector and Treasurer, made oath that they are "personally acquainted with the land, and know the character, the improvements thereon, and all the surroundings thereof," and that in their opinion the land could not

at any time during the year 1898 have been sold for more than $3,500 in cash, had the vendor been able to convey the same by an absolute perfect warranty title.

This Court said, in *Willis* vs. *Eastern Trust and Banking Company*, 167 U. S., 76, that it was true "that it had been stipulated that the value of the real estate exceeded $5,000, but the right to possession was the matter in dispute, and there is nothing in the record from which we conclude that the value of that reaches the jurisdictional amount."

So it is in the case at bar, even conceding the value of the land to be $6,000 there is nothing in the record by which can be determined the value of the naked possession of the land, during the time in which Jaekson has to make final proof and apply for patent.

But the full value of the land with all the improvements thereon is shown not to exceed $3,500.

The right asserted by Black is entirely speculative—its value cannot be calculated or determined by any known rule. He may die and it does not appear that he has any heirs; he may himself in many ways forfeit or lose his right to make a homestead entry before Jackson may relinquish his entry, if he contemplates such a course. At best Mr. Black can only claim an inchoate right, which he may in many ways forfeit and lose. His interest as alleged is too uncertain and contingent to give this Court jurisdiction of his appeal.

In *Huntington* vs. *Saunders*, 163 U. S., 319, this Court said:

> "The matter in controversy must have *actual value*, and that cannot be supplied by speculation on the possibility that if a discharge were refused, something might be made out of the bankrupt."
>
> South Carolina *vs.* Seymour, 153 U. S., 353, and cases therein cited.
>
> Dunham *vs.* Seymour, 161 U. S., 235.

The court below could not adjudicate any question relating to the title to the land involved in this suit, neither can this court. But in order to determine what the value of the asserted right of Black is, the court must first determine where the title is now vested, and that Black not only has the qualifications and the means of acquiring full title to the land from the United States, but that he will actually do so if not prevented by Jackson. A more contingent right could scarcely be imagined, or one to which it would be more difficult to fix a money value,

Respectfully submitted,

FRED BEALL,
Attorney for Motion.

Supreme Court of the United States.

OCTOBER TERM, 1899.

Nos. 107 and 143.

E. F. BLACK, *Appellant*,
v.
WALTER P. JACKSON.
and
J. C. POTTS, *Appellant*,
v.
THOMAS N. HOLLEN.

BRIEF FOR APPELLEES.

STATEMENT.

These two cases, which by agreement, are to be heard by this Court together, come up by appeals from the Supreme Court of Oklahoma Territory, which court affirmed the decrees of the District Court of Kay County, in said Territory. The appellees have filed motions in the respective cases, to dismiss the appeals for want of jurisdiction, and insist that

their motions should be sustained, but will also file a short brief on the merits.

In the case of *Black* v. *Jackson*, the facts are stated in the opinion of the Territorial Supreme Court, found in the record, pages 16–19.

In *Potts* v. *Hollen*, the facts are set out in the opinion of the Oklahoma Supreme Court on pages 15–17, of record of that case.

Each of the appellees in these two cases has a homestead entry on the land involved in his case, and the respective claims of the appellants have been decided by the Land Department adversely to them.

The real question in each case before the Land Department was the qualification of the appellees herein respectively, to make homestead entry in what was the Cherokee Outlet, that part of Oklahoma Territory opened to settlement September 16, 1893, under the act of Congress approved March 3, 1893. (27 Stats., 640.) The disqualification alleged against each was that he made the race on the day of the opening of the Outlet from the south side of the Chillocco Indian Industrial School Reservation, which is a block of land 4½ miles long east and west and 3 miles deep, reserved out of the north end of the Cherokee Outlet by Executive order in 1884, for an Indian Industrial School, since which time it has in no sense been a part of the Cherokee Outlet. The treaty, by the terms of which the United States acquired absolute title to the Outlet, was made December 19, 1891, more than 7 years after the date of the said Executive order. The Act of Congress providing for the opening of the outlet for settlement, expressly declared that the Chillocco Indian Industrial School lands should "not be subject to public settlement, but shall, until further action of Congress, continue to be reserved for the purposes for which they were set apart in the said Executive order." (27 Stats., 642.)

ARGUMENT.

In neither of the cases is the title to the land decribed in pleadings involved. In both instances the title remains in the United States, and is wholly and exclusively within the jurisdiction of the Land Department. That Department has, in both of the cases, adjudged that the appellees are, as against the appellants, entitled to make homestead entry of the lands by them respectively claimed. A homestead entryman, in order to earn a patent to the land entered, must reside on it for a period of not less than five years and must cultivate and improve it. A failure on the part of a homestead entryman to occupy the land, and maintain his residence thereon continuously for five years, to the exclusion of a residence elsewhere, renders his entry liable to cancellation; so also, a failure to cultivate and improve the land included within his entry, works a forfeiture of the entry.

Upon the sworn declaration of the entryman that "he will faithfully and honestly endeavor to comply with all the requirements of law as to settlement, residence, and cultivation necessary to acquire title to the land applied for," is his entry allowed. The Land Department has adjudged that each of the appellees in these cases has a right to make entry of the land claimed by him, and that such right in him is superior to that of his adversary, and accordingly in the case of *Black* v. *Jackson*, the Department canceled Black's entry and awarded the right of entry to Jackson, which he, in due time exercised, but Black refuses to leave the land, and persists in occupying a part of the tract, and otherwise interferes with the possession thereof by Jackson. Black is insolvent and financially wholly irresponsible.

In the case of *Potts* v. *Hollen*, the entry was made in the first place by Hollen, and after Hollen had made his entry, Mrs. Potts contested it on the alleged ground that Hollen had disqualified himself to make said entry by making the race

on the day of the opening, from the south side of the Chilocco reservation. She never had a legal settlement on the land.

The Land Department decided that contest in Hollen's favor, holding his entry intact. Mrs. Potts in the meantime had unlawfully intruded herself on the land, and was a trespasser thereon when the original suit in this case was brought against her.

The Land Department possesses no such judicial powers as are necessary to protect an entryman in his right of possession to the land included within his entry.

There can be no other recourse, therefore, for the protection of the possessory rights of an entryman than the courts.

As stated above, one who applies for and is granted a homestead entry, assumes certain obligations to the United States, and the Government confers on him the right to occupy, use and enjoy the land entered. The United States retains the legal title to the land as a security that the entryman will comply with his obligations. The right in the entryman to possess the land as against all other persons, is an absolute necessity to enable him to perform his part of the contract.

QUESTIONS INVOLVED.

Counsel for the appellants in their brief in case of *Black* v. *Jackson* lay down four questions or propositions, which they insist are involved in that case, and which they argue in their order, as follows:

"First. That courts of general jurisdiction are not vested with authority, either in law or in equity, to settle the rights of claimants, of the character involved here, to the possession of the public lands, while the title to the same remains in the United States."

"Second. That if such jurisdiction subsists, it falls within the province of a court of law and not a court of equity."

Third. If such jurisdiction be conceded to exist in a court of equity, it is to be administered upon equitable principles, and such court will not lend its aid to a party who by his own wrong and fraud has secured an illegal and unjust advantage.

"Fourth. That the Department of the Interior was clearly mistaken in its application of the law to the facts of the case, the Chilocco Indian reservation being a part of the inhibited country into which intending settlers were not allowed to enter, and the plaintiff in the court below is therefore disqualified from acquiring title to the land in controversy and should be treated as a wrong-doer by the denial of any affirmative equitable relief."

I.

The Land Department having in due course of procedure decided in each of these cases, that the appellee is entitled to make entry of the land claimed by him, his right to the exclusive possession of the land embraced in his entry made pursuant to the adjudication of the Department, follows as a necessary legal sequence. The right of possession is a property right, which the courts will protect, pending the final determination of the title.

This Court said in *Marquez* v. *Frisbie*, 101 U. S., 473, on page 475, referring to what the court said in *Johnson* v. *Towsley*, 13 Wall., 72, and *Shepley* v. *Cowan*, 91 U. S., 330:

"We did not deny the right of the courts to deal with the possession of the land prior to the issue of the patent."

If after the entry of a homestead has been made, the entryman could not appeal to the courts for protection against those who might invade his homestead, and who

could thereby prevent the entryman from residing upon, and cultivating the land in accordance with the requirements of the homestead law, a right, most important both to the individual, and the Government, would be liable to be destroyed, without any remedy whatever. The contention of counsel on this point is too abhorrent to all ideas of justice and too fraught with evil consequenses to justify an extended consideration thereof, and I pass to their second proposition, which is, that if there is any jurisdiction in the courts to protect an entryman in his possessory rights to his homestead, that it is at law and not in equity.

II.

NATURE OF THE ENTRYMAN'S RIGHT.

In the first place the right of a homestead entryman is an imperfect equity. He has no legal title to the land entered; that remains in the United States, subject to the rights of the Government under the homestead law, and the question of the entryman's ultimately acquiring title is dependent upon his compliance with the law, and finally paying the price fixed by law for the purchase of the land. It is the enjoyment of this equity which is sought to be protected in both the cases at bar.

THE ALLEGATIONS OF THE BILL.

It is alleged in the bills (called in Oklahoma petitions), that each of the defendants therein (appellants in this Court) is in possesion of a part of the respective homesteads, and wrongfully holds such possession and refuses to vacate the and, notwithstanding the Land Department has awarded the right of entry thereof to the plaintiff; that the defendant is trespassing on the land, and that he is insolvent.

The prayer of each bill is substantially that the Court enjoin the defendant from entering upon or in any way trespassing upon or using any portion of the land embraced in the homestead entry of plantiff, and from removing or destroying the fence, wells, or other improvements on the land which are permanently attached thereto.

The Interior Department and this Court have unifomly held, that anyone who goes upon a homestead for which another holds a valid entry, is a mere trespasser, and can acquire no rights by such trespass. *McMichael* v. *Murphy*, 20 L. D., 147.; *Sturr* v. *Beck*, 133 U. S., 548.; *Atherton* v. *Fowler*, 96 U. S., 513.; *Hosmer* v. *Wallace*, 97 U. S., 575.; *Hastings etc. R. R. Co.* v. *Whitney*, 132 U. S., 357.

Under the allegations of the bills or petitions in these cases, the defendants were wrongfully holding possession of parts of the land involved, under an assertion of an illegal claim to the whole tract. The claim of each of the plaintiffs went to the whole of the tract, and not only to the part actually held by him. The case is quite a different one to that where the party proceeded against only asserts a right or claim to so much of the land as is actually held or occupied by him. The conduct of the defendants under the allegation in the petitions was calculated to do an irreparable injury to the entrymen, by not only depriving them of the occupancy and cultivation of the land, which they had sworn they would reside on and cultivate for a period of five years, but also of depriving them of the means of acquiring the money necessary to pay for the land at the end of five years.

This question is exhaustively discussed in *Woodruff* v. *Wallace*, 3 Oklahoma Rpt. 355, to which, and the authorities therein cited, I respectfully invite the attention of the Court. On page 371, will be found the occupying claimant's act of Oklahoma, followed by a discussion of the same.

JURISDICTION TO ISSUE A MANDATORY INJUNCTION.

In addition to the authorities cited in *Woodruff* v. *Wallace*, *supra*, and *Sproat* v. *Durland*, 2 Oklahoma, 25, I call attention to the following authorities:

In Re Lennon, 166 U. S., 548-556, and cases therein cited; 2 Story's Eq. Jus. (3 ed.) page 261, Sec. 959, and notes thereto; 3 Pomeroy's Eq. Jus. (2 ed.) page 2093, Sec. 1359, and notes thereto.

III.

The third proposition laid down by counsel for appellants, involves the consideration of a question that was not before the court below, and could not be, viz., the qualification of the appellees to make their respective entries. The Land Department, it is conceded, found both of the appellants qualified to make entry of their respective homesteads. This was the judgment of the Land Department on the facts before it. If in this it erred, that error can only be corrected by the courts after patents shall issue. The jurisdiction of the Land Department over the *title* to the land is absolute and exclusive, so long as the title remains in the United States, nor does any action had by the Land Department become final so long as the title does remain in the United States; all of its rulings and judgments are, in their nature, interlocutory, and may be reviewed and set aside at any time, until the patent is actually issued. *Aspen Consolidated Mining Co.* v. *Williams*, 27 L. D., 1, and cases of this Court therein cited. It follows that the Land Department yet has the jurisdiction to correct any errors, either in fact or of law, that it may have made in reference to the qualifications of the entryman, and that the courts have no such jurisdiction until the patents shall issue. *United States* v. *Schurz*, 102 U. S., 378.

IV.

The answer just made to the third proposition of Appellees applies with equal force to their fourth proposition.

It has too often been decided by this Court that the sole and exclusive jurisdiction for the disposition of the public domain is vested in the Land Department, and that the courts cannot and will not control the Land Department in its disposition of the public lands, to admit of discussion. The court's power over title to the public lands never attaches until the titles have passed out of the United States. Then, if the Land Department has erred in its application of the law to the facts, or if it has been imposed upon by fraud, the courts may be appealed to correct such errors, or set aside titles acquired by fraud. *Smelting Co.* v. *Kemp*, 104 U. S., 636; *New Orleans* v. *Paine*, 147 U. S., 261; *Michigan Land and Lumber Co.* v. *Rust*, 168 U. S., 589; *Williams* v. *United States*, 137 U. S., 514.

CONCLUSION.

Should the motions filed by the appellees to dismiss these cases for want of jurisdiction be overruled, and the jurisdiction of this Court upheld, yet it is insisted that the merits of the controversy are with the appellees in each case.

If the Court shall find that the value of the subject-matter of these suits is respectively sufficient to give it jurisdiction, then, in that event, there can possibly be but one question for its consideration, and that is whether the remedy of the appellees was in equity, or at law.

This Court said in *Tyler* v. *Savage*, 143 U. S., 79, that the remedy at law to exclude equity must be as *practical* and *efficient* to the ends of justice and its prompt administration as the remedy in equity, and in *Kilbourn* v. *Sunderland*, 130 U. S., 505, that the jurisdiction in equity attaches unless

the legal remedy *both in respect to the final relief*, and the mode of obtaining it is as efficient as the remedy in equity. Again, equitable jurisdiction may be invoked in view of the inadequacy of the legal remedy, where the injury is destructive or of a continuous character, irreparable in its nature. *Osborne & Co.* v. *Missouri P. R. Co.*, 147 U. S., 248.

A proceeding by unlawful detainer could not give full relief against the wrongful acts of the defendant—it would not prevent removal of permanent improvements on the land; it would not stop the destruction of timber; it would not put an end to the trespassing of the defendant on the homestead of the plaintiff. The final relief by an action of unlawful detainer would not be as complete or as efficient as the remedy invoked in equity.

The reasoning on this point in *Woodruff* v. *Wallace*, *supra*, seems to me perfectly unanswerable.

All the questions involved in the cases at bar are elementary, and exceedingly simple. I therefore forbear discussing them further, and especially as the appellant, Potts, has filed no brief to sustain her appeal, or made answer to the motion to dismiss her appeal.

FRED BEALL,
Attorney for Walter P. Jackson and Thomas N. Hollen,
Appellees.

Supreme Court of the United States.

OCTOBER TERM, 1899.

Silas A. Holcomb, Clerk.

U. S. BOTTS, APPELLANT,

vs.

THOMAS H. BOLLEN.

APPEAL FROM THE SUPREME COURT OF OKLAHOMA TERRITORY.

Motion to Dismiss and Brief in Support of Same.

FRED BEALL,
Attorney for Motion.

(17,005.)

Gibson Printing Co.,
409 D Street, N. W.

Supreme Court of the United States.

OCTOBER TERM, 1899,

No. 143.

J. C. POTTS,
Appellant,
vs.
THOMAS N. HOLLEN,

APPEAL FROM THE SUPREME COURT OF OKLAHOMA TERRITORY.

MOTION TO DISMISS APPEAL.

Comes now the said Thomas N. Hollen by his attorney of record and moves this Honorable Court to dismiss the appeal herein: First, because this Court has no jurisdiction of said appeal, the subject matter of controversy being the right of the possession of a certain homestead in Oklahoma Territory, the title to which is still in the United States; Secondly, because there is no sufficient allegation in the pleadings, nor any proof showing the actual money value

of said possession; and Thirdly, because the actual value of the land with a clear and unclouded title, the possession of which is involved, is not of sufficient value to give this Court jurisdiction, nor is there anything involved in said appeal of which this Court can take jurisdiction.

FRED BEALL,
Attorney for Thomas N. Hollen.

STATEMENT AND BRIEF ON MOTION TO DISMISS.

This case comes to this Court on appeal from the Supreme Court of Oklahoma Territory. It arises out of conflicting claims by the parties to the suit to a homestead right on the public lands within the territory of what was known as the Cherokee Outlet, opened to settlement on September 16, 1893, by proclamation of the President, pursuant to the Act of Congress, approved March 3, 1893, (24 Stat. 640.)

The appellee is the entryman of the land involved, and has successfully maintained his right to the land in the Land Department. The claim of the appellant had been decided against him before the suit was instituted.

The title to the land involved remains in the United States, the entryman not yet having prosecuted his entry to patent. The time allowed by law for making final proof has not yet expired.

The appellant having settled on the land involved, contested through the Land Department the appellee's right thereto, and when the contest was finally decided by the Land Department the appellee having the entry on the land and being in possession of only a part thereof, filed his petition in the proper District Court of Oklahoma for a mandatory injunction to enjoin the defendant, "from inter-

fering with the said plaintiff's possession, use and occupancy of the land included in his homestead entry and that she be restrained from cultivating, improving, or occupying any portion of said tract." Rec., p. 4.

Appellee filed with his petition a certified copy of the record from the Land Department, showing the adjudication thereof of the land contest between the parties and the awarding of the land by the Secretary of the Interior to Hollen. Rec., 4-5.

Potts answered the petition of Hollen, confessing the truth of the allegations therein as to the contest and its results, and then set up as her sole defense that Hollen was disqualified to make entry of said land by reason of the fact that he had made the race into the Cherokee Outlet on the day of the opening from the south side of the Chilocco Reservation. She did not allege the value of the land, nor the value of the possession thereof. Rec., 7.

At the trial of the cause, Mr. Hollen to support his petition, introduced the record of the Land Department, and also testified orally. Rec., 9–10.

Mrs. Potts introduced no proof, but filed what she called a demurrer to the evidence, assigning two causes :

"1st. That the evidence did not sustain the allegations of the petition.

2d. That the evidence did not show plaintiff to have a cause of action." Rec., 11.

Thereupon the Court entered a decree in accordance with the prayer of the petitioner. Rec., 11–12.

From the decision of the District Court Potts appealed to the Supreme Court of Oklahoma Territory, which affirmed the decision of the District Court (Rec., 15–17), from which judgment and decree of the Supreme Court of Oklahoma Potts has brought the case here by appeal.

There is nothing whatever in the record to give jurisdiction to this Court. No value is shown in the pleadings. The

only reference to any value is found in the affidavit of Mr. S. H. Harris which seems to have accompanied the application for appeal. In his affidavit he states there is more than $5,000 involved in said appeal.

The appellee has filed in this Court an affidavit made by a number of citizens of the County in which the land is situated, a copy of which is as follows :

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1898.

No. 421.

J. C. POTTS, *Appellant*,
vs.
THOMAS N. HOLLEN, *Appellee*.

AFFIDAVITS AS TO THE VALUE OF PROPERTY.

TERRITORY OF OKLAHOMA, } ss:
COUNTY OF KAY. }

Personally came and appeared before N. T. Smith, a Notary Public, in and for the said County and Territory, John Goad, A. E. Foreman, Samuel Dawson, John Hawes, W. A. Ellis, Frank Pierce, and W. S. Cline, each and all of whom are well and personally known to me to be good and reputable citizens of said County and Territory, and credible persons,

and each and all being by me first duly sworn, each deposes and says that he knows the location and character and value of the southeast one-fourth of Section 32, Township 28 north, Range 3 east, I. M., Kay County, Oklahoma Territory, the same being the land involved in the above entitled cause, and each and all of said affiants say that to the best of his and their knowledge and belief, the full value of said land with all the improvements on the same, does not exceed the sum of Three Thousand and no–100 Dollars.

Said affiants further say respectively each that his avocation is that set opposite his name, to-wit:

JOHN GOAD, *farmer.*
A. E. FOREMAN, *farmer.*
SAMUEL DAWSON, *farmer.*
W. A. ELLIS, *physician.*
JOHN HAWES, *farmer.*
FRANKLIN PIERCE, *Sheriff of Kay County.*
W. S. CLINE, *lawyer.*

A. E. FOREMAN, *Three Thousand.*
S. T. DAWSON, *Three Thousand.*
W. A. ELLIS, *Three Thousand Dollars.*
JOHN HAWES, *Three Thousand Dollars.*
W. F. PIERCE, *Three Thousand.*
JOHN GOAD, *Three Thousand.*
W. S. CLINE.

Subscribed and sworn to before me this 3d day of January, 1899.

N. T. SMITH,
Notary Public.

My commission expires on the 21st day of February, 1899.
[SEAL.]

(*Revenue Stamp.*)

The appeal seems to have been taken purely for delay. Certainly there is nothing in the record which gives jurisdiction to this Court.

The following cases seem to be conclusive of the question involved on this motion :

Willis *vs.* The Eastern Trust and Banking Co., 167 U. S., 76.
Huntington *vs.* Saunders, 163 U. S., 319.
South Carolina *vs.* Seymour, 153 U. S., 353, and cases therein cited.
Dunham *vs.* Seymour, 161, U. S., 235.

Respectfully submitted,

FRED BEALL,
Attorney for Motion.

Statement of the Case.

upon or using any portion of the land embraced in the plaintiff's homestead entry; from removing or in any manner destroying the fence or other improvements on the lands that were permanently attached thereto; and for such other and further relief as the court deemed just and right. The defendant filed an answer, but it was withdrawn that he might file a demurrer. He demurred to the application for an injunction upon the grounds, among others, that it did not state facts sufficient to constitute a cause of action and the court was without jurisdiction of the subject-matter of the action. The demurrer was overruled, and the defendant after excepting to that ruling filed an amended answer. In this answer he set up title in himself as a homestead settler, set forth the manner in which it had been acquired, alleged that the value of the property was $6000, and prayed judgment. In his original answer he claimed that he was entitled to a trial by jury, and in his amended answer he insisted that his rights could not be disposed of in equity before the court only. The trial court sustained a demurrer to the answer, and the defendant declining to further answer, judgment was rendered for the plaintiff as prayed for in the application for a mandatory injunction, the defendant being enjoined from in any manner entering upon the premises in question or exercising any control or possession over them except for the purpose of removing therefrom his improvements, including buildings and fences for which thirty days' time was given, which judgment was sustained by the Supreme Court of the Territory. *Held:*

(1) That this court has jurisdiction as the amount involved is beyond the jurisdictional amount.

(2) That the case made out by the plaintiff was not such as to entitle him to a mandatory injunction, and that the court of original jurisdiction erred in determining the cause without a jury.

By a petition filed by Jackson against Black in the District Court of Kay County, Oklahoma Territory, the following case was made:

On the 17th day of November, 1896, Jackson made a homestead entry upon the S.W. ¼ sec. 26, T. 28, R. 2 east, I. M. The same land prior to that date had been embraced in a homestead entry made by Black, but that entry was finally held for cancellation by the Secretary of the Interior, who by a decision rendered October 26, 1896, denied Black's motion for review and allowed Jackson to make entry of the land. After that decision Black continued to remain in possession of the west eighty acres of the tract, and refused and neglected to vacate the same, although requested to do so. He had upon the land a barbed wire fence and other improvements attached

to the realty. It was alleged that he was financially unable to respond in damages for any injury he was causing the plaintiff by trespassing upon the land, and that plaintiff had no adequate remedy other than by this suit.

The relief asked was a mandatory injunction to restrain the defendant from entering upon or in any manner trespassing upon or using any portion of the land embraced in the plaintiff's homestead entry; from removing or in any manner destroying the fence or other improvements on the lands that were permanently attached thereto; and for such other and further relief as the court deemed just and right.

The defendant filed an answer, but it was withdrawn that he might file a demurrer. He demurred to the application for an injunction upon the grounds, among others, that it did not state facts sufficient to constitute a cause of action and the court was without jurisdiction of the subject-matter of the action. The demurrer was overruled, and the defendant after excepting to that ruling filed an amended answer.

In the first paragraph of the amended answer the defendant alleged that he had resided upon the land in question since about the 16th day of September, 1893, claiming a right thereto under the laws of the United States; that at the time of settlement thereon and thereafter he was a legally qualified homestead claimant; that he had done no act of any kind or nature since the 16th day of September, 1893, disqualifying him to hold the land as a homestead; that on the 31st day of October, 1895, he filed a homestead entry upon the land, and afterwards the plaintiff filed a contest against such entry upon the ground that his settlement as a homestead claimant was prior to that of defendant and prior to the filing of defendant's homestead entry; that it had been finally determined and decided by the Land Department of the United States that defendant's settlement upon and entry of the land was subsequent to that of plaintiff, and defendant's homestead entry was cancelled and plaintiff allowed to make homestead entry upon the sole ground that plaintiff's settlement was prior to the settlement and homestead entry of the defendant; that during the time he had resided upon the land, defendant had

BLACK *v.* JACKSON.

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APPEAL FROM THE SUPREME COURT OF THE TERRITORY OF OKLAHOMA.

No. 107. Submitted February 1, 1900.— Decided March 26, 1900.

By a petition filed by Jackson against Black in the District Court of Kay County, Oklahoma Territory, the following case was made: On the 17th day of November, 1896, Jackson made a homestead entry upon the S.W. ¼ sec. 26, T. 28, R. 2 east, I. M. The same land prior to that date had been embraced in a homestead entry made by Black, but that entry was finally held for cancellation by the Secretary of the Interior, who by a decision rendered October 26, 1896, denied Black's motion for review and allowed Jackson to make entry of the land. After that decision Black continued to remain in possession of the west eighty acres of the tract, and refused and neglected to vacate the same, although requested to do so. He had upon the land a barbed wire fence and other improvements attached to the realty. It was alleged that he was financially unable to respond in damages for any injury he was causing the plaintiff by trespassing upon the land, and that plaintiff had no adequate remedy other than by this suit. The relief asked was a mandatory injunction to restrain the defendant from entering upon or in any manner trespassing

placed thereon lasting and valuable improvements, worth about $500, claiming to be entitled to the benefit of the laws of the United States and of the Territory of Oklahoma relating to occupying claimants; and that his rights "cannot be disposed of in a case in equity before the court only."

The second paragraph of the answer alleged that on the 16th day of September, 1893, and thereafter the defendant was a native-born citizen of the United States, in all respects qualified to make homestead entry upon the land in question; that on that day, after 12 o'clock, central standard time, (a signal for starting from the outer line of the Cherokee outlet being given,) he ran from the 100-foot strip along the south line of the State of Kansas that had been measured, staked off, and reserved as a gathering place for those desiring to "run" for lands in the Cherokee outlet, and made all possible haste to secure and settle upon a suitable piece of land as a homestead; that there were many thousands of people along that line, more than could secure homes in the outlet, allowing one hundred and sixty acres to each qualified entryman; that the plaintiff, not observing the law, the proclamation of the President, and the rules governing the opening of those lands to settlement, and for the purpose of gaining an unlawful and undue advantage of defendant and others seeking a home in the outlet, crossed the 100-foot reserve around the outer boundary of the lands prior to 12 o'clock noon, central standard time, September 16, 1893, and unlawfully and wrongfully entered upon the lands embraced within the outlet and within the 100-foot reservation known as the Chilocco reservation, and at the hour of noon, when the outlet was opened to settlement, started on the race for a home from the south line of that reservation and about three and one half miles south of the 100-foot reservation along the northern boundary of the Cherokee outlet, and thereby wrongfully, unlawfully, and unjustly started in the race for a home three and one half miles in advance of the defendant and others who observed the law of Congress opening the lands to settlement and the President's proclamation pursuant thereto; that plaintiff's prior settlement was wholly by reason of said advantage; that plaintiff filed in the United States land office at Perry, Oklahoma Territory, a contest

against defendant's homestead entry made upon the land described in the petition on the 31st day of October, 1893, and as grounds for the contest alleged and claimed that he, plaintiff, settled upon the land in question, claiming it as his homestead prior to the settlement and homestead entry of defendant; that upon the trial of such contest it was conclusively proven and admitted by plaintiff that he had started upon the race from the south line of the Chilocco reservation as stated; that upon such trial the register and receiver of the land office at Perry, Oklahoma Territory, found from the evidence that plaintiff had started upon the race from the point and in the manner mentioned, and also that his settlement upon and claim of the land was prior to that of defendant, and the qualification of the plaintiff to acquire a homestead on account of his having entered upon the land in violation of the act of Congress opening the same to settlement and the President's proclamation pursuant thereto was directly in issue between plaintiff and defendant in the contest case; but that the register and receiver, although finding from the evidence and admissions of plaintiff that he had so entered upon said land, misunderstood and wrongfully interpreted and misapplied the law in relation to the qualification of plaintiff to take and hold the land as a homestead, and expressly found as a matter of law that plaintiff was not disqualified as "a sooner" by reason of having entered upon the land in the manner aforesaid.

The answer also alleged that the defendant duly appealed from the decision of the register and receiver to the Commissioner of the General Land Office, presenting to that officer the same question with reference to the disqualification of plaintiff to acquire title to the land as a homestead, but that the Commissioner misapplied the law and wrongfully and unlawfully sustained the conclusion of the register and receiver in that regard; that the defendant then appealed to the Secretary of the Interior, to whom the same legal question was submitted, and the Secretary also misapplied the law in relation to the qualification of plaintiff and wrongfully and unlawfully sustained the findings of the Commissioner; that the defendant duly filed his motion for review in the case, in which the question as to the qualifica-

tion of plaintiff was presented, and urged a reconsideration and reversal, but the Secretary, still misunderstanding and misapplying the law, wrongfully and unlawfully refused a review, and wrongfully and contrary to law cancelled the homestead entry of defendant and permitted plaintiff to make homestead entry of the land, although plaintiff was at the time and still is wholly disqualified to acquire title to it based upon a prior settlement by reason of his having entered upon the Cherokee outlet in violation of law; that by reason of such disqualification the plaintiff could never acquire the title to the land, nor a greater estate therein than a trust estate for the sole benefit of the defendant; that defendant was lawfully entitled to reside upon the land as a homestead and acquire the title thereto by compliance with the laws of the United States and the rules of the Land Department; and that plaintiff, being disqualified to acquire title, should not be heard in this action to demand that defendant be ejected from the land and his home and improvements thereon.

The answer further alleged that if the defendant were ejected from the land and his home and improvements thereon the plaintiff would relinquish to the Government of the United States for a valuable consideration all his claim to and interest in the land, and the same would "be entered as a homestead by some other person qualified to enter and hold the same and a stranger to the disqualification and wrongful acts of the plaintiff herein; that said land, with the improvements thereon by this defendant, could be transferred in the manner aforesaid for the sum of $6000; that he has been by temporary order of this court restrained from exercising the right of possession and control over all of said land, with the exception of about five acres occupied by his dwelling and improvements immediately surrounding the same, and that he is ready and willing to execute to the plaintiff a good and sufficient bond to compensate him for all loss of every kind or nature occasioned by defendant's occupancy and detention of said five acres and improvements, provided defendant is allowed to retain his possession thereof and so remain in position to assert his rights to all of said land as soon as he can possibly do so in accordance with law."

The defendant prayed: First. That the plaintiff be not allowed to further maintain his action for the possession of the land or any part thereof. Second. That in the event that prayer was not granted the plaintiff be denied the right to maintain his action to the extent of wholly ejecting the defendant from the five acres and his dwelling and improvements situated thereon until such time as the plaintiff acquired a patent to the land and the defendant was in a position to commence suit for the purpose of having plaintiff's title so acquired declared to be held in trust for him.

The trial court sustained a demurrer to the answer, and the defendant declining to further answer, judgment was rendered for the plaintiff as prayed for in the application for a mandatory injunction, the defendant being enjoined from in any manner entering upon the premises in question or exercising any control or possession over them except for the purpose of removing therefrom his improvements, including buildings and fences, for which thirty days' time was given.

This judgment was affirmed in the Supreme Court of the Territory. That court in its opinion held (using the words of the syllabus prepared by the court) that "where adverse claimants are residing upon a tract of land and each claiming the same as a homestead by virtue of priority of settlement, and the Land Department makes a final award thereof, the losing party cannot properly claim the right to continue his residence upon the land for the purpose of bringing a suit in equity to declare a trust against his successful adversary, when he has already resided upon the land a sufficient length of time, under the law, to enable him to make final proof for the land." 6 Okla. 751.

Mr. John W. Shartel and *Mr. S. H. Harris* for appellant.

Mr. Fred. Beall for appellee.

Mr. Justice Harlan, after stating the facts, delivered the opinion of the court.

1. The final judgment of the Supreme Court of the Territory

can be reëxamined here if the value of the matter in dispute be sufficient to give this court jurisdiction. The defendant claimed to have acquired by his entry and settlement a vested interest in the entire land covered by his entry, and insisted that even if the plaintiff obtained a patent therefor the title would be held in trust for him. He proceeds in his defence upon the ground that after residing upon the land for the period designated in the statute he will be entitled under the law to a patent. It ought not to be assumed that he will put himself in such position that he cannot demand a patent. Although the naked legal title remains in the United States in trust for the person who may earn it, we think that in determining the value of the matter in dispute we should look at the value of the land, not simply at the value of the right of present possession. According to the weight of proof, the value of the land embraced by the homestead entry of Black is more than the sum required for our jurisdiction. 23 Stat. 443, c. 355; 26 Stat. 81, 86, c. 182, § 9. Besides, the demurrer admitted the averment in the answer to the effect that the land with the defendant's improvements thereon could be transferred in the manner stated in the answer for the sum of $6000. The motion to dismiss the appeal must therefore be overruled.

2. This case having been determined on demurrer to the answer, it must be taken as true that Black resided upon the land in dispute on and after September 16, 1893, claiming the right to do so in virtue of the laws of the United States and of a homestead entry made before the one made by Jackson. It appears that the Land Office recognized the prior right to be in Jackson. This action of the Land Office, Black contends, was erroneous in matter of law, and he has announced his purpose, in the event a patent is issued to Jackson, to institute appropriate judicial proceedings, the object of which will be to have it declared that the legal title is held in trust for him. He insists that although, in the absence of fraud, the courts will not go behind the facts found by the Land Department in any contest before it relating to the administration of the public lands, he is not concluded by the decision of that department upon questions of law.

If parties are injuriously affected by any action of the Land

Department based upon an erroneous view of the law, the courts have power in some form to protect their rights against such illegal action. In *Cornelius* v. *Kessel*, 128 U. S. 456, 461, this court said: "The power of supervision possessed by the Commissioner of the General Land Office over the acts of the register and receiver of the local land offices in the disposition of the public lands, undoubtedly authorizes him to correct and annul entries of land allowed by them, where the lands are not subject to entry, or the parties do not possess the qualifications required, or have previously entered all that the law permits. The exercise of this power is necessary to the due administration of the land department. If an investigation of the validity of such entries were required in the courts of law before they could be cancelled, the necessary delays attending the examination would greatly impair, if not destroy, the efficiency of the department. But the power of supervision or correction is not an unlimited or an arbitrary power. It can be exerted only when the entry was made upon false testimony, or without authority of law. It cannot be exercised so as to deprive any person of land lawfully entered and paid for. By such entry and payment the purchaser secures a vested interest in the property and a right to a patent therefor, and can no more be deprived of it by order of the Commissioner than he can be deprived by such order of any other lawfully acquired property. Any attempted deprivation in that way of such interest will be corrected whenever the matter is presented so that the judiciary can act upon it." So in *Sanford* v. *Sanford*, 139 U. S. 642, 647, it was said that where the matters determined by the Land Office "are not properly before the department, or its conclusions have been reached from a misconstruction by its officers of the law applicable to the cases before it, and it has thus denied to parties rights which, upon a correct construction, would have been conceded to them, or where misrepresentations and fraud have been practised, necessarily affecting its judgment, then the courts can, in a proper proceeding, interfere and control its determination so as to secure the just rights of parties injuriously affected" — citing *Quinby* v. *Conlan*, 104 U. S. 420, 426; *Baldwin* v. *Stark*, 107 U. S. 463, 465.

As to Jackson's right to possession, it is clear that although successful in his contest with Black before the Land Office, no patent could issue to him under the original homestead law until after the expiration of five years from the date of his entry, and not then except upon proof that he, or if he be dead his widow, or if she be dead her heirs or devisees, prove "by two credible witnesses that he, she or they have resided upon or cultivated the same for the term of five years immediately succeeding the time of filing the affidavit, [required by § 2290 of the Revised Statutes,] and makes affidavit that no part of such land has been alienated, except as provided in § 2288, and that he, she or they will bear true allegiance to the Government of the United States; then, in such case, he, she or they, if at that time citizens of the United States, shall be entitled to a patent, as in other cases provided by law." Rev. Stat. § 2291. But by the third section of the act of May 14, 1880, entitled "An act for the relief of settlers on public lands," 21 Stat. 140, c. 89, it was provided "that any settler who has settled, or who shall hereafter settle, on any of the public lands of the United States, whether surveyed or unsurveyed, with the intention of claiming the same under the homestead laws, shall be allowed the same time to file his homestead application and perfect his original entry in the United States land office as is now allowed to settlers under the preëmption laws to put their claims on record, and his right shall relate back *to the date of settlement*, the same as if he settled under the preëmption laws."

It thus appears that Jackson holds only an inchoate title to the land in dispute, and that he may so conduct himself before making final proof and securing final certificate as to forfeit his right to obtain a patent based upon the decision of the Land Office.

By the decree below the defendant is enjoined from entering upon the premises in question or exercising any further control or possession over them, except to remove his improvements within thirty days after the decree. In his original answer the defendant claimed that he was entitled to a trial by jury, and in his amended answer he insisted that his rights could not be disposed of in equity before the court only.

Opinion of the Court.

What circumstances under the laws of Oklahoma will justify the use of a mandatory injunction for the purpose of ousting a person of the possession of land and putting his adversary in possession—neither party having the legal title—is left in some doubt by the decisions of the Supreme Court of that Territory. *Sproat* v. *Durland*, 2 Okla. 24; *Peckham* v. *Faught*, 2 Okla. 173; *Reaves* v. *Oliver*, 3 Okla. 62; *Woodruff* v. *Wallace*, 3 Okla. 355; *Procter* v. *Stuart*, 4 Okla. 679; *Barnes* v. *Newton*, 5 Okla. 428; *Laughlin* v. *Fariss*, 7 Okla. 1; *Glover* v. *Swartz*, 58 Pac. Rep. 943; *Brown* v. *Donnelly*, 59 Pac. Rep. 975. Some of the decisions seem to restrict the right to such an injunction to cases in which the defendant was a mere trespasser upon the particular land in dispute without color or pretense of claim or title, while others recognize the appropriateness of that remedy where a plaintiff seeks possession after succeeding in a contest before the Land Office with one who at the initiation of such contest was in peaceable possession and in good faith contending for his right to such possession.

We think that the decision in *Laughlin* v. *Fariss*, 7 Okla. 1, 5–7, 9, 11, should be accepted as a correct exposition of the law of the Territory. What was that case? One F. M. Fariss made a homestead entry on land and received a certificate of cash entry. The interest so acquired was conveyed by deed to W. D. Fariss. Before F. M. Fariss made his final proof, Laughlin filed against him a contest on the ground of prior settlement. That contest finally came before the Secretary of the Interior for review and was decided adversely to Laughlin. Subsequently, and before F. M. Fariss made his final proof, Laughlin filed another contest alleging that Fariss was disqualified to make a homestead entry by reason of having entered the Oklahoma country in violation of law. Fariss' assignee sued Laughlin, alleging that he was entitled to the sole and exclusive occupancy of the land, and asking that an injunction be awarded restraining Laughlin from cultivating or interfering with the land and removing him from the premises.

The questions presented to the Supreme Court of Oklahoma for decision in that case were: 1. Did the petition show that plaintiff had an equitable title to the tract of land in contro-

versy? 2. If so, was that title a sufficient basis for an action at law for the recovery of the possession of the land? 3. Should questions 1 and 2 be answered in the affirmative, then the inquiry was whether the petition contained a sufficient statement of facts to justify the relief sought and obtained?

The court answered the first question upon the authority of *Laughlin* v. *Farris*, 7 Okla. 1, 6, in which it was held that "when a homestead entryman has complied with all the requirements of the Federal statutes applicable to the disposal of the tract of land occupied by him, and has made his final proof, paid the amount of money required and received final certificate therefor, he has a complete equitable title to said land, with the naked legal title only remaining in the Government."

In answering the second question in the affirmative, the court referred to section 614 of the territorial Code of Civil Procedure which provides: "In an action for the recovery of real property, it shall be sufficient if the plaintiff state in his petition that he has a legal or equitable estate therein, and is entitled to the possession thereof, describing the same, as required by section 127, and that the defendant unlawfully keeps him out of possession. It shall not be necessary to state how the plaintiff's estate or ownership is derived." Stats. Okla. (1893) 864, Title Procedure — Civil. Section 127 here referred to provides that "in any action for the recovery of real property, it shall be described with such convenient certainty as will enable an officer holding an execution to identify it." The Supreme Court of the Territory said, 7 Okla. 6: "It would seem that the language of this section is too plain to need the support of authority to show that an equitable title or estate in land is a sufficient basis for an action in the nature of ejectment, but if such were necessary it can be found in abundance by consulting the decisions of the Supreme Court of the State from which the statute was taken" — citing *Simpson* v. *Boring*, 16 Kan. 248; *Kansas Pac. Ry. Co.* v. *McBratney*, 12 Kan. 9; *Duffey* v. *Rafferty*, 15 Kan. 9; *State* v. *Stringfellow*, 2 Kan. 263; *Atchison, Topeka &c. Railroad* v. *Pracht*, 1 Pac. Rep. 319. The court added: "It is also apparent that the allega-

tions contained in plaintiff's petition regarding his title and right of possession are amply sufficient to entitle him to maintain *an action of forcible detainer for the possession of said tract of land. Price* v. *Olds*, 9 Kan. 66; *Conaway* v. *Gore*, 27 Kan. 122."

The third question was answered in the negative, the court reaffirming the principle announced in *Richardson* v. *Penney*, 6 Okla. 328, in which it was said: "We still hold to the well, if not universally, established doctrine that, when a party has a plain and adequate remedy at law he cannot invoke the powers of a court of equity to issue its writ of injunction."

In the course of its opinion the court having stated that it was conceded that the action of forcible entry and detainer would lie in a case like the one then before it, said: "This remedy by injunction, both mandatory and prohibitive in character, may and does sometimes become a very far-reaching and oppressive, as well as a speedy and effective one, and should only be granted by courts of equity in cases where the applicants therefor bring themselves clearly within the well-defined and established rules authorizing the issuance of same; hence, such courts rarely deem it necessary or advisable to interfere in this manner, to aid a person endeavoring to recover the possession of real property" — citing High on Injunctions, 2d ed. §§ 354, 355 and 360, and *Lacassagne* v. *Chapuis*, 144 U. S. 119, 124. The rule, the court observed, was clearly and concisely stated by this court in *Lacassagne* v. *Chapuis*, in which it was said: "The plaintiff was out of possession when he instituted this suit, and by the prayer of this bill he attempts to regain possession by means of the injunction asked for. In other words, the effort is to restore the plaintiff by injunction to rights of which he had been deprived. The function of an injunction is to afford preventive relief, not to redress alleged wrongs which had been committed already. An injunction will not be used to take property out of the possession of one party and put it into that of another. . . . The plaintiff has a full, adequate and complete remedy at law, and the case is not one for the jurisdiction of a court of equity."

The Supreme Court of the Territory thus concluded its opin-

ion in *Laughlin* v. *Fariss:* "We hold that the action of injunction will not lie to adjust possessory rights to a tract of land after the equitable title thereto has passed from the Government of the United States and become vested in an individual, unless in a case which presents some recognized special ground therefor, which must be one other than that one party claims that he is the owner and entitled to the immediate possession thereof and that the other party unlawfully and without any right whatever holds and retains such possession. We therefore conclude that the facts, stated by the plaintiff below in his amended petition, are not sufficient to entitle him to the interference of a court of equity."

In the decision in *Laughlin* v. *Fariss* all the justices of the Supreme Court of the Territory concurred, including those who constituted the majority when the present case was decided. And we cannot find that that court has in any case withdrawn or qualified the ruling that an entryman, out of possession and having a decision by the Land Office in his favor, may proceed against his adversary in possession by an action of forcible detainer and thus obtain possession without resorting to the extraordinary remedies used by courts of equity. According to the decisions of that court, Black, as between himself and his successful adversary, was in possession without color of title. Now, by the statutes of the Territory, in the Article relating to forcible entry and detainer, if it be found that lands and tenements after a lawful entry "are held unlawfully," then the justice "shall cause the party complaining to have restitution thereof;" and it is provided that proceedings under that Article may be had in all cases "where the defendant is a settler or occupier of lands and tenements, without color of title, and to which the complainant has the right of possession." Stats. Okla. 1893, 919, 920, §§ 4805, 4806.

In the opinion in the present case the Supreme Court of the Territory said nothing about defendant's contention that he was entitled to a trial by jury. Speaking by the same justice who in the court below delivered the opinion in the present case, the Supreme Court of the Territory in *Barnes* v. *Newton*, 5 Okla. 428, 432, conceded that in a case between contesting entrymen

the one who obtained the decision of the Land Office might avail himself of the statutory provisions relating to forcible entry and detainer, but that such a remedy was not sufficiently efficacious, for the reason that "by delays and appeals a party in possession of a homestead could keep his adversary out of possession of the land for years." But the same reason could be urged to justify the extraordinary remedy of a mandatory injunction in order to put a defendant out of possession, even where the plaintiff was entitled to maintain ejectment or an action in the nature of ejectment. The suggestion referred to leaves out of view the distinction made by the Constitution of the United States between cases in law and cases in equity. *Robinson* v. *Campbell*, 3 Wheat. 212, 223; *Payne* v. *Hook*, 7 Wall. 425; *Van Norden* v. *Morton*, 99 U. S. 378; *Smyth* v. *Ames*, 169 U. S. 466, 516. And it also fails to recognize the provisions of the Seventh Amendment securing the right of trial by jury in "suits at common law" where the value in controversy exceeds twenty dollars. That Amendment, so far as it secures the right of trial by jury, applies to judicial proceedings in the Territories of the United States. *Webster* v. *Reid*, 11 How. 437, 460; *American Publishing Co.* v. *Fisher*, 166 U. S. 464, 466; *Springville* v. *Thomas*, 166 U. S. 707. So that a court of a Territory authorized as Oklahoma was to pass laws not inconsistent with the Constitution of the United States, 26 Stat. 81, 84, c. 182, § 6, could not proceed in a "common law" action as if it were a suit in equity and determine by mandatory injunction rights for the protection or enforcement of which there was a plain and adequate remedy at law according to the established distinctions between law and equity. And this evidently is in accordance with the statutes of Oklahoma providing that while the court must try issues of law, unless referred in the mode prescribed, "issues of fact arising in actions for the recovery of money or of specific real or personal property, shall be tried by a jury, unless a jury trial is waived or a reference be ordered." Stat. Okla. 1893, 809, § 4156.

In the case before us no special grounds are disclosed that would authorize the court to issue a mandatory injunction and determine without a jury the issue as to the right of possession.

If it be said that the plaintiff's residence upon the land for a given time is necessary in order that he may earn a patent, the answer is that the defendant is not alleged to be in the actual possession of the entire land embraced by the plaintiff's entry. Nor does it appear that the plaintiff may not, without interference by the defendant, maintain a residence upon that part of the land which is not in the actual possession of the defendant and do all that may be requisite in order to earn a patent. We may also observe that it is not alleged that the defendant is doing any actual injury to the part of the land remaining in his possession. It does not appear that he has done anything except to continue in possession of that part. If Black prevents Jackson from taking possession of the 80 acres in question, he is entitled to bring his action of forcible detainer and to recover possession unless it appears that the Land Office erred, as matter of law, in deciding for him. It is not meant by this that an action of forcible detainer is the only remedy that can be adopted by the plaintiff.

As in Oklahoma the distinction between actions at law and suits in equity is abolished — each action being called a civil action, whatever the nature of the relief asked, Okla. Stat. 1893, 764, § 3882 — we perceive no reason why the case may not proceed in the trial court under the pleadings as they have been framed, with the right of the defendant to a trial by jury in respect of all issues which, according to the recognized distinctions between actions at common law and suits in equity, are determinable in that mode.

3. One of the defenses made by Black is that the plaintiff entered upon the land in violation of the act of March 1, 1889, 24 Stat. 759, c. 317, and of the act of March 2, 1889, 25 Stat. 980, 1005, c. 412, as well as of the proclamation of the President of March 25, 1889, 26 Stat. 1544, 1546. The acts and proclamation referred to related to the lands obtained by the United States under the agreement with the Muscogee or Creek Nation of Indians in the Indian Territory. The contention of the defendant is that the plaintiff by his conduct disqualified himself from acquiring any interest in the tract of land here in dispute which was part of the lands obtained from the Muscogee or

Statement of the Case.

Creek Indians, and consequently the Land Office erred as matter of law in its decision for the plaintiff. *Smith* v. *Townsend*, 148 U. S. 490; *Payne* v. *Robertson*, 169 U. S. 323; *Calhoun* v. *Violet*, 173 U. S. 60, 62. No opinion was expressed on this question by the Supreme Court of the Territory, and we need not now express an opinion. If the plaintiff should proceed against the defendant in some other mode than by injunction, the facts connected with his alleged unlawful entering upon the lands opened for settlement under the above acts and proclamation can all be proved, and any question arising out of them as to his disqualification to acquire any interest whatever in the land in dispute can then be determined.

We are of opinion that the case made out by the plaintiff was not such as to entitle him to a mandatory injunction, and that the court of original jurisdiction erred in determining the cause without a jury.

The decree of the Supreme Court of the Territory is therefore reversed, and the cause is remanded with directions to set aside that decree, and for such further proceedings as will be consistent with law and this opinion.

POTTS *v.* HOLLEN.

APPEAL FROM THE SUPREME COURT OF THE TERRITORY OF OKLAHOMA.

No. 143. Submitted February 1, 1900. — Decided March 26, 1900.

For the reasons stated in the opinion in *Black* v. *Jackson*, *ante*, 349, the court holds that the issue of fact involving the right of possession of the premises in dispute could not properly be determined without the aid of a jury, unless a jury was waived; and that the case made by the plaintiff was not such as to entitle him to a mandatory injunction.

THIS action was commenced by petition filed in the District Court for Kay County, Oklahoma Territory.

The plaintiff Hollen, the appellee here, alleged that on the

Statement of the Case.

13th day of October, 1893, he made a homestead entry of the southeast quarter of section 32, township 28 north, of range 3 east, I. M., in Perry land district, Oklahoma Territory, which land office had jurisdiction over that tract, and the officers of which had authority to make and allow such entry; that there was filed in that office at Perry a certified affidavit of contest by defendant Potts; that under the allegations of that contest the case went to a hearing, after which a decision was rendered in favor of plaintiff and the contest case was dismissed, from which decision defendant appealed, but not within the time required by law, to the Commissioner of the General Land Office who affirmed the decision of the local land office; that the defendant filed an amended contest affidavit before the Commissioner, which was rejected and the motion for rehearing was denied; that the defendant appealed from the Commissioner's decision, and on the 9th day of June, 1896, the Secretary of the Interior passed upon the case and affirmed the action of the Commissioner; that all the proceedings before the Interior Department upon which the defendant was entitled to be heard with reference to such land contest had been had and the case was fully closed; that under and by virtue of his homestead entry the plaintiff was entitled to the exclusive use, benefit and possession of all the southeast quarter of section 32, township 28 north, range 3 east; that under claim of right, based upon the contest so dismissed, defendant entered upon said quarter section and entered into possession of a part thereof, erecting or causing to be erected a house and other improvements thereon, and still maintained possession of a portion of the section under the protest and against the wishes of plaintiff and without claim or color of title thereto; that defendant at the time had pending before the Department of the Interior no contest or claim or right or title to said tract or piece of land; that defendant was insolvent and unable to respond in damages to the plaintiff, and her possession of and improvements upon the tract prevented the plaintiff from properly cultivating and using that portion of the land in her possession; that defendant threatened, by retaining the possession of a portion of the tract, to involve the plaintiff in many vexatious suits, to his great and irreparable damage

and injury; that she had been in possession of a portion of the land since a short time after the opening of the Cherokee outlet; that the plaintiff had no adequate remedy at law; that the defendant had used, cultivated and controlled about 25 acres of the land to plaintiff's damage in the sum of one hundred and fifty dollars; and that the rents and profits of the land so used by the defendant would amount to about one hundred and fifty dollars.

The relief asked was that the defendant, her agents and employés, be restrained from interfering with the plaintiff's possession, use and occupancy of the land included in his homestead entry; that she be enjoined from cultivating, improving or occupying any part of the tract; and that she be permitted within a time to be fixed to remove therefrom any improvements made by her prior to the plaintiff's homestead entry, and vacate the land on the order of the court.

The defendant in her answer admitted that "defendant [plaintiff] has the homestead entry in said land and that defendant filed a contest against said entry," but denied each and every other material allegation of the petitioner. The defendant also alleged that "she filed a contest against the said entry of the said Hollen, charging and alleging in substance that plaintiff was disqualified to enter and hold lands by reason of having entered the Cherokee outlet prior to 12 o'clock noon of September 16, 1893, and run from the south side of the Chillocco reservation, which is three and one half miles south of the lines established in the President's proclamation; that said contest was rejected and defendant duly appealed, and while said cause was still pending defendant filed her amended affidavit of contest against said entry, a copy of which said contest is attached to plaintiff's petition, marked 'Exhibit C,' and hereby referred to and made a part of this answer. Defendant further alleges that within the time required by the rules of practice in the Land Department, to wit, July 22, 1896, she filed a motion for a review of the Secretary's decision of June 9, 1896, a copy of which said motion is hereto attached, marked 'Exhibit A,' and made a part hereof; and that said cause is

now and was pending at the commencement of this action in the Land Department of the United States."

The plaintiff filed a reply denying "each and every material allegation" in the defendant's answer.

To sustain the issues on his part the plaintiff introduced in evidence an official communication to the register and receiver at Perry, Oklahoma, from the Commissioner of the Land Office dated November 24, 1896, which showed that the defendant's motion for a review of the previous action taken in the contest case had been denied by the Land Department. That communication concluded: "The case is hereby closed, and you will advise said Potts that she may, if she elects, file a new contest against the entryman Hollen incorporating the charge set out in her amended affidavit in due time the action taken, transmitting therewith evidence of notice hereof and of the decision of the department." The plaintiff then testified in his own behalf, stating that he had the homestead entry on the land in dispute; that the defendant was residing on part of it, about 25 acres. The plaintiff having rested upon this proof, the defendant demurred to the evidence upon two grounds: 1. It did not sustain the allegations of the petition. 2. It did not show that the plaintiff had a cause of action. The demurrer was overruled, an exception to that action of the court being taken. The defendant stood upon the demurrer and introduced no evidence.

The trial court without a jury rendered judgment for the plaintiff, enjoining the defendant from interfering with his right to possess and control the land in question, "except that the defendant is hereby given the right to enter upon and harvest the fall wheat crop she has sown upon the land in dispute, and is to remove said wheat from said land within thirty days after the same is ripe and fit to cut;" and she was further enjoined and restrained "from removing or interfering [with] or injuring in any way any well of water that she may have placed upon said land, and all growing timber or trees that she may have placed upon said land, and any growing timber or trees that she may have planted."

The Supreme Court of the Territory affirmed the judgment

of the inferior court. The syllabus of its opinion, prepared by the court, is as follows: "Injunction—When properly granted. —A filed a homestead entry for a tract of Government land. B initiated a contest, alleging that A was disqualified from entering the land. The contest was by the Land Department decided in favor of A. During the pendency of such contest B filed an amended affidavit of contest, alleging a different ground of disqualification upon the part of A. Shortly after B first instituted the first contest, B in some manner became possessed of about 25 acres of the land, and held such possession until after the final decision upon the first contest. Held, that upon the authority of *Sproat* v. *Durland*, 2 Okl. 24, A was entitled to an injunction restraining B from interfering with the possession of A, and requiring him to remove from the land in dispute." 6 Okla. 696.

From the judgment of the Supreme Court of the Territory the defendant appealed to this court.

Mr. John W. Shartel and *Mr. S. H. Harris* for appellant.

Mr. Fred. Beall for appellee.

Mr. Justice Harlan, after stating the case, delivered the opinion of the court.

The motion to dismiss the present appeal is denied. The land in question is shown to be of greater value than five thousand dollars. In addition to the affidavits filed on the subject of value, the record contains an order made by the Supreme Court of the Territory on the application for appeal stating that more than the above amount was involved in the action. This order we assume was based upon proof as to value.

One of the assignments of error is that the Supreme Court of the Territory erred in holding that the trial court had jurisdiction of the subject of the action and the right to entertain the suit as a proceeding in equity and without a trial by jury.

For the reasons stated in the opinion in *Black* v. *Jackson*, just decided, we adjudge that the issue of fact involving the right of possession of the premises in dispute could not properly

be determined without the aid of a jury, unless a jury was waived. Without repeating what was said in that opinion, we also hold that the case made by the plaintiff was not such as to entitle him to a mandatory injunction.

The decree is reversed and cause remanded for such further proceedings as may be consistent with this opinion.

Reversed.